THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1847:

COMPRISING

REPORTS OF CASES

IN THE COURTS OF

Chancery, and Bankruptcy, Queen's Bench, Common Pleas,

(Including Cases on APPEAL from the Decisions of Revising Barristers,)

Exchequer of Pleas,

Exchequer Chamber, and the Hall Court,

FROM

MICHAELMAS TERM 1846, TO TRINITY TERM 1847,
BOTH INCLUSIVE;

AND

Notes of Judgments in the HOUSE of LORDS, during that Period.

EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, ESQ.,
ONE OF HER MAJESTY'S COUNSEL.

VOL. XXV.

NEW SERIES—VOL. XVI.

LONDON:

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NAMES OF THE REPORTERS.

1847.

Lord Chancellor's Court,

PHILIP TWELLS, Esq. Barrister-at-Law.

Rolls Court,

FREDERICK JAMES HALL, Esq. Barrister-at-Law.

Court of the Vice Chancellor of England,

THOMAS WYATT GUNNING, Esq. Barrister-at-Law.

Court of the First Vice Chancellor,

BENEDICT LAWRENCE CHAPMAN, Esq. Barrister-at-Law.

Court of the Second Vice Chancellor,

EDWARD COOKE, Esq. Barrister-at-Law.

Court of Bankruptcy,

BENEDICT LAWRENCE CHAPMAN, Esq. Barrister-at-Law.

Court of Queen's Bench,

PHILIP BOCKETT BARLOW, Esq., HENRY SELFE SELFE, Esq. and HENRY JOHN HODGSON, Esq. Barristers-at-Law.

Hall Court and Exchequer Chamber,

HENRY JOHN HODGSON, Esq. and ALEXANDER JAMES JOHNSTON, Esq. Barristers-at-Law.

Court of Common Pleas,

WILLIAM LEECE DRINKWATER, Esq., GEORGE MORLEY DOWDESWELL, Esq. and THOMAS SANDERS, Esq. Barristers-at-Law.

Exchequer of Pleas,

HENRY HORN, Esq. and FRANCIS TOWERS STREETEN, Esq. Barristers-at-Law.

CASES RELATING TO MAGISTRATES,

REPORTED PRINCIPALLY BY

PHILIP BOCKETT BARLOW, Esq., HENRY SELFE SELFE, Esq., HENRY JOHN HODGSON, Esq. and ALEXANDER JAMES JOHNSTON, Esq. Barristers-at-Law.

JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM, 1846, TO TRINITY TERM, 1847, INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. Lord Cottenham, Lord High Chancellor.
The Right Hon. Lord Langdale, Master of the Rolls.
The Right Hon. Sir Lancelot Shadwell, Knt., Vice Chancellor of England.
The Right Hon. Sir James Lewis Knight Bruce, Knt., First Vice Chancellor.
The Right Hon. Sir James Wigram, Knt., Second Vice Chancellor.

IN THE COURT OF REVIEW, IN BANKRUPTCY.

The Right Hon. Sir James Lewis Knight Bruce, Knt., Chief Judge.
The Hon. Sir George Rose, Knt.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. Thomas Lord Denman, Lord Chief Justice.
The Hon. Sir John Patteson, Knt.
The Hon. Sir John Taylor Coleridge, Knt.
The Hon. Sir William Wightman, Knt.
The Hon. Sir William Erle, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir Thomas Wilde, Knt., Lord Chief Justice.
The Hon. Sir Thomas Coltman, Knt.
The Hon. Sir William Henry Maule, Knt.
The Hon. Sir Cresswell Cresswell, Knt.
The Hon. Sir Edward Vaughan Williams, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir Frederick Pollock, Knt., Lord Chief Baron.
The Right Hon. Sir James Parke, Knt.
The Hon. Sir Edward Hall Alderson Knt.
The Hon. Sir Robert Mounsey Rolfe, Knt.
The Hon. Sir Thomas Joshua Platt, Knt.

Sir John Jervis, Knt., Attorney General.
Sir David Dundas, Knt., Solicitor General.

PREFERMENTS AND MEMORANDA.

In the vacation between *Trinity* and *Michaelmas Terms*, the Right Honourable Sir Nicolas Conyngham Tindal died at Folkestone, in the county of Kent.

In the same vacation, Sir John Williams, one of the Judges of the Court of Queen's Bench, after a short illness, died at his country residence, near Bury St. Edmunds.

Sir Thomas Wilde, Knt., was appointed Chief Justice of the Court of Common Pleas, and Edward Vaughan Williams, Esq., Barrister-at-Law, of Lincoln's Inn, was promoted to the judicial office, and having been raised to the dignity of the Coif, gave rings, with the motto, "*Legum servi ut libere.*" Shortly afterwards the honour of knighthood was conferred upon him.

Mr. Justice Erle, one of the Judges of the Court of Common Pleas, on the decease of Sir John Williams, was appointed one of the Judges of the Court of Queen's Bench, and Mr. Justice Vaughan Williams to the vacant seat upon the bench of the Court of Common Pleas.

In the same vacation, Mr. Serjeant Talfourd and Mr. Serjeant Manning were appointed Her Majesty's Serjeants-at-Law. Mr. Serjeant Murphy and Mr. Serjeant Byles received patents of precedence.

At the commencement of *Michaelmas Term*, pursuant to the provisions of the statute 9 & 10 Vict. c. 54, all barristers practising in the superior courts at Westminster were admitted to practise, plead, and be heard in the Court of Common Pleas, and were called upon to move, and had audience during term time, as in the other courts of common law.

In this term also, Charles Buller, Esq., of Lincoln's Inn, was appointed one of Her Majesty's Counsel learned in the law.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery.

BY

PHILIP TWELLS, Esq., FREDERICK JAMES HALL, Esq.,
THOMAS WYATT GUNNING, Esq., EDWARD COOKE, Esq.,
AND
BENEDICT LAWRENCE CHAPMAN, Esq.
BARRISTERS-AT-LAW.

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10 & 11 Victoriæ.

MICHAELMAS TERM 1
HILARY TERM 162
EASTER TERM 297
TRINITY TERM 348

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery.

MICHAELMAS TERM, 10 VICTORIÆ.

K. BRUCE, V.C.
May 2, 4.
L.C.
May 27; June 2.
November.

SHARP *v.* DAY.

Railway Company—Provisional Committee—Parties.

The provisional committee of a projected railway company incurred certain joint liabilities, and were possessed of certain joint property. A majority of them agreed that 30l. should be paid by each of the provisional committee, to raise a fund for the payment of all their liabilities. One of the committee refused to pay his 30l., and an action was brought against him by the secretary, with the sanction of the committee. He thereupon filed a bill against the secretary and the members of the audit committee who had received the 30l. from all the persons who had paid their contributions, alleging that they had sufficient funds for the payment of all the joint liabilities, and praying that accounts might be taken of the monies come to their hands, and of all the joint liabilities, and that the funds in their hands might be applied in discharge of their liabilities, and for an injunction to restrain the action at law. A demurrer to this bill for want of equity was overruled; but a demurrer for want of parties, on the ground that all the persons who had contributed 30l., and all the provisional committeemen, were necessary parties to the suit, was allowed.

The bill in this case was filed by the plaintiff, on behalf of himself and all other persons interested as partners in the partnership or company called the East Riding Junction Railway Company, except such of the partners in the same as were named as defendants, against W. B. Day and nine other defendants. It stated, that previously to the month of October 1845, the defendant W. B. Day, together with other parties, projected a partnership or company, to be called as above, for the purpose of making a railway, commencing at the town of Great Driffield, on the Bridlington branch of the Hull and Selby Railway, and terminating at Melton, in Yorkshire; that two prospectuses were issued, to the latter of which were appended the names of all the defendants, and of thirty-six other persons, constituting the provisional committee, and inviting persons to become members of the company; and stating that the company had been provisionally registered, that the capital would consist of 350,000*l.* in 17,500 shares of 20*l.* each, with a deposit of 2*l.* 2*s.* per share, and that the liability of the subscribers would be limited to the extent of their deposits until the act of parliament should be obtained, and afterwards to the amount of their shares; that advertisements to a similar effect were inserted in several newspapers; that the plaintiff, about the 9th of October, became a member of the provisional committee, the defendant Day acting as secretary of the company *pro tem.*,

and without salary; but no shares had ever been allotted either to the plaintiff or any other member of the provisional committee, or to any applicants; but that in December 1845 the members of the provisional committee resolved, by a majority of eight, to bring the undertaking to a conclusion, and that the expenses which had been incurred should be defrayed by the contribution of 10*l.* by each member of the provisional committee, the same to be paid to certain bankers, for the audit committee, which committee consisted of the nine defendants, not including Day; that several payments were made agreeably to this resolution, and that the monies which were paid, were paid or transferred to the nine defendants, in trust for the liquidation of the liabilities of the company; that a report was made by the audit committee on the 31st of December 1845, announcing that the liabilities of the company amounted to 1,545*l.*; that the provisional committee then came to a resolution, that each of its members should contribute, as his portion, the sum of 30*l.*, on or before the 8th of January then next; that at the date of the last-mentioned resolution, the provisional committee had reached to the number of eighty-three members, and that the result of the contribution, as proposed, would be a sum of 2,490*l.*, instead of 1,545*l.*, the actual amount of the liabilities; that divers sums of money had been paid to the nine defendants, in compliance with those resolutions, and that those defendants had possessed themselves of other property of the partnership, applicable to the discharge of their liabilities; and that out of the monies so paid to and possessed by them, they had paid all the liabilities of the company, except 220*l.* due to the solicitor, and 45*l.*, which was claimed by the defendant Mr. Day; that the defendants, out of the monies contributed, had a balance in their hands more than sufficient to pay what was due, and that, under the circumstances aforesaid, the plaintiff declined to contribute his quota of 30*l.*, although he was willing to pay what might be fairly and justly payable by him, as his contribution towards the payment of the liabilities; that an action had been brought against the plaintiff by Mr. Day, for work and labour, services, care, diligence, and attendance, and for money paid to his use, and that a verdict had been obtained by Mr. Day, at the late Spring Assizes at York, for 45*l.*, but leave was given to move to enter a nonsuit; that whatever was due to Mr. Day was payable out of the monies in the hands of the defendants, which were to be treated as trust funds, for the purposes of the company. It was charged that Mr. Day's acceptance of the office of secretary was incompatible with his continuance as a member of the provisional committee, and that he had in his particulars of demand in his action, claimed to be paid as secretary, from the 1st of October 1845, the sum of 74*l.*, part of which had been paid by the committee.

The bill then prayed that an account might be taken of the monies and property belonging to the company or partnership which had come to the hands of the defendants, or the hands of any person by their order, or for their use, in trust for the partnership or company, and of all monies which, by virtue of the resolutions come to by the parties, had been paid to or possessed by the defendants, for the purpose of discharging the debts and liabilities of the partnership or company; that an account might also be taken of the debts and liabilities of the partnership or company then remaining unsatisfied; that the outstanding property of the company or partnership might be collected and applied under the directions of the Court, so far as it would extend, towards the discharge of the debts and liabilities; and that, if necessary, a receiver might be appointed by the Court to carry into effect the above purposes; and that the defendants might be restrained from collecting or recovering the property or monies of the company or partnership, or any part thereof, or from interfering therewith, or from applying any monies or property paid or subscribed, or thereafter to be so, in consequence of the resolutions, otherwise than under the direction of the Court, in discharge of the debts of the company, and for the purposes for which such monies had been subscribed; and that the defendants might be restrained by injunction from prosecuting the said action at law against the plaintiff, or taking any other proceeding at law, touching the matters aforesaid.

Day put in a demurrer to this bill for want of equity, and also for want of parties,

on the ground that the parties, who had contributed to the fund in the hands of the defendants, and also all the provisional committee, were necessary parties. The other nine defendants put in another demurrer on the same grounds.

Mr. L. Wigram and *Mr. Follett*, for the demurrers.—The bill asks for accounts, and for the distribution of a fund raised by subscription, to which the plaintiff had never contributed, and he asks this while parties interested in that fund are not before the Court. They are not represented by the plaintiff, because he has not contributed to the fund, and he wants the money belonging to other parties to be applied in satisfying demands to which he is personally liable. No partnership was ever formed; the proceedings were merely preliminary, but the intention was ultimately abandoned, and therefore the plaintiff could not sustain a bill for partnership accounts.

Mr. Parry and *Mr. Kenyon*, for the bill. —A partnership was formed sufficiently to give all the parties who had engaged in the project a common interest; in respect of which they are all concerned in knowing how the funds have been applied. Funds have been placed in the hands of the defendants for the purpose of discharging the joint liabilities; and the plaintiff, being one of the parties subject to these liabilities, is entitled to have them discharged out of the fund raised for that object. The provisional committee have all the same interest in the proper application of the fund and in ascertaining the fair amount of contribution which each member ought to pay.

The following cases were cited:—

Richardson v. *Larpent*, 2 You. & Coll. C.C. 509.
Fox v. *Clifton*, 6 Bing. 776; s. c. 8 Law J. Rep. C.P. 257.
Bourne v. *Freeth*, 9 Barn. & Cress. 632; s. c. 7 Law J. Rep. K.B. 292.
Wood v. *the Duke of Argyle*, 6 Man. & Gr. 933; s. c. 13 Law J. Rep. (N.S.) C.P. 96.
Walworth v. *Holt*, 4 Myl. & Cr. 619; s. c. 10 Law J. Rep. (N.S.) Chanc. 138.
Long v. *Yonge*, 2 Sim. 369.
Richardson v. *Hastings*, 7 Beav. 323; s. c. 13 Law J. Rep. (N.S.) Chanc. 142.
Edger v. *Knapp*, 6 Sco. N.R. 707.

Mr. L. Wigram, in reply, insisted that the plaintiff had not by his bill offered to contribute anything to pay the joint liabilities.

KNIGHT BRUCE, V.C.—In this case the bill may, I think, be understood as alleging that the defendants are in possession of funds in effect as trustees, for purposes, in the fulfilment of which the plaintiff and other persons are interested, who are so numerous as to render the junction of them individually in a suit substantially incompatible with its prosecution, and on whose behalf and on his own he sues; and that the defendants have acted and intend to act in contravention of those purposes, and it prays relief upon that footing. Whatever I may think of the wisdom of instituting such a suit as upon the face of the bill this appears to be, and assuming the professed object of the bill to be the true object—whatever I may consider as being the probable fruits of this litigation, I am apprehensive that if I allow the demurrers, I shall be introducing a new rule, or, by making more strict, altering old rules now in use. There seems to be enough in the case to induce the Court to overrule the demurrers; but whether the bill is likely to benefit the plaintiff is a different question. It is not, however, without doubt that I hold it to be at the present stage sustainable; nor is the question of the applicability of the principle upon which I proceeded in *Richardson* v. *Larpent* the only ground of doubt that I have. But, doubting, I must allow the plaintiff to call for answers. Let the demurrers be overruled without costs, and without prejudice to any question in the cause.

The defendants appealed from this decision, and the case was argued before the Lord Chancellor (Lord Lyndhurst) on the 27th of May and 2nd of June by—

Mr. Bethell and *Mr. Follett*, for the demurrers; and

Mr. Parry and *Mr. Kenyon*, contrà.

His Lordship resigned the Great Seal

before giving judgment in this case: but all parties having consented to be bound by his decision, his Lordship forwarded the following judgment in the course of the long vacation.

The LORD CHANCELLOR.—The parties composing the provisional committee in this case had incurred joint debts and liabilities to a considerable amount. They were also, independently of the subscriptions mentioned in the bill, possessed of joint property to some extent. It is so stated in the bill, and for the present purpose the statement must be taken to be true. The plaintiff complains that the defendants have possessed themselves of this property, and that it is applicable and ought to be applied to the discharge of the joint debts and liabilities; but that the defendants intended to apply it to other and improper purposes. He prays therefore, among other things, for an account of this property, and of the joint debts and liabilities, and that the property may be applied in the discharge of such debts, &c. It appears to me, upon this statement, that there is enough of averment in the bill to sustain it against a general demurrer for want of equity.

But the bill goes much farther: the plaintiff requires not only an account of this property, but also of the fund subscribed pursuant to the resolutions of the meeting of the provisional committee, but to which he had refused to contribute. He complains of the intended misapplication of the money, and prays various matters respecting it. I cannot understand, however, by what right he claims to represent the subscribers to this fund, or to unite himself with them in a suit respecting it. The money was voted and paid upon the faith that all would contribute their proportion. This, the plaintiff declined doing. He can have no right, therefore, to interfere with the fund, or to direct or controul its application; it belongs exclusively to the subscribers; and if he wishes to enforce any supposed claim with respect to it, he cannot, I conceive, do this by representing or uniting himself with them, but must proceed adversely against them, and in such a manner as to give them an opportunity of properly defending their rights. The plaintiff is seeking to free himself from liability at their expense; that is, out of a fund which belongs solely to them.

A principal object of the bill is to restrain further proceedings in the action at law brought by Day. The subscribers have no interest in obtaining this injunction; still less have they an interest in applying a fund exclusively theirs in discharge of the debt for which the action is brought.

I think, therefore, the record is improperly framed in respect to the parties, and that the demurrer ought to be allowed. I feel the less difficulty in coming to this conclusion, as the Vice Chancellor rested his judgment principally upon the doubts which he entertained when the case was before him.

WIGRAM, V.C. Nov. 12. } GIBSON *v.* INGO.

Amendment—Parties—New Charges—Irregularity.

Under an order at the hearing, giving leave to amend, by adding parties, with apt words to charge them, the plaintiff will not be allowed, by amendment, to introduce charges raising a new issue as between himself and the original defendants; though such charges affect merely to state a conclusion of law.

This was a bill filed by Gibson, as mortgagee of the ship *Ann Mackenzie*, to realize his security. At the hearing an objection was taken that J. Hopper was a necessary party to the suit; and the cause stood over, with liberty to the plaintiff to amend his bill by adding proper parties thereto, with apt words to charge them, or by shewing that Hopper was not a necessary party, or with liberty to file a supplemental bill. The bill was amended by making Hopper a party; and the amended bill, after charging that Hopper sometimes claimed an interest in the matters aforesaid, or some of them, and that he sometimes claimed to recover from the plaintiff some considerable sum of money by way of demurrage or damages in the nature thereof, for the detention of the said ship or vessel, in consequence of the certificate of registry being detained by the other defendants, Carter, Bonus, & Simpson, contained this charge, which had been

added by amendment, "that the three last-named defendants are liable to the plaintiff for such sum as the plaintiff is or may be liable to pay to the said J. Hopper, for damages as aforesaid."

A motion was now made on behalf of the defendants Carter, Bonus, & Simpson, that the amended bill might be taken off the file for irregularity.

Mr. Chandless for the motion, contended, that the latter charge in the amended bill transgressed the liberty given to the plaintiff by the order to amend, as it raised a new issue of liability between the plaintiff and the original defendants.

Mr. Romilly and *Mr. Heathfield*, contrà, contended, that under the order giving leave to amend, the plaintiff was entitled to introduce such charges as were necessary to connect the new defendant with the previous case made against the original defendants; that the amendment merely stated a conclusion of law, without introducing any new facts; and that the old defendants were not prejudiced, as the relief pointed at by the amendment might be had under the prayer for general relief — *Milligan* v. *Mitchell* (1).

WIGRAM, V.C.—When, at the hearing of a cause, an objection is taken for want of parties, and the Court orders the cause to stand over, with liberty to the plaintiff to amend by adding parties, with apt words to charge them, all the Court intends by that order is to enable the plaintiff to bring the new party before the Court, in order that the original cause may be heard, without any variation, against the old defendants, in the presence of the new parties. Here Hopper has been made a party to the suit, with apt words to charge him; but the plaintiff has added a charge that the other defendants are liable to the plaintiff for whatever the plaintiff shall be liable to Hopper. Such a charge is not necessary to enable the plaintiff to make out his case against Hopper. But it is said that the old defendants are not damnified, for that relief, in this respect, might be had under the prayer for general relief. With respect to the extent of relief to be given under the general prayer, I have no means of judging till the hearing. If the same relief may be had without this charge, then the charge is immaterial; but if the additional charge may have the effect of raising a fresh issue against the old defendants, then that fact is conclusive against its being allowed to stand. It is impossible to deny that a charge, which is a mere conclusion of law, may not affect the relief to be given at the hearing. It is quite enough to say that a charge has been introduced which may make it necessary for the old defendants to put in a new answer and raise a different defence. I am of opinion that this is a substantial variance from the terms of the order giving leave to amend. The charge must be expunged at the cost of the plaintiff, who must also pay the costs of this application.

(1) 1 Myl. & Cr. 511; s. c. 7 Law J. Rep. (N.S.) Chanc. 37.

L.C. Nov. 17, 18, 19, 20. { THE DUKE OF LEEDS v. EARL AMHERST.

Waste—Tenant for Life—Compensation—Acquiescence.

Under the marriage settlement of the late Duke of Leeds, made in 1797, *the family estates, including Kiveton Hall, were settled upon the late duke for life, without impeachment of waste, with remainder to his eldest son in tail male. In* 1809, *the late duke pulled down the mansion-house of Kiveton Hall, cut the ornamental timber and other trees, destroyed the garden, and converted the estate into a farm. The plaintiff, who was his only son, attained the age of twenty-one in the year* 1819, *when he joined with his father in suffering a recovery of the estates, but did not at that time make any claim for compensation, in respect of the waste which had been committed. The plaintiff married in* 1828, *contrary to his father's wishes, and differences arose between them. The late duke died in* 1838, *upon which the plaintiff filed his bill against the trustees and devisees of his father's will, claiming compensation for these acts of waste. The defendants contended, that the late duke was justified in converting the family mansion into a farm, as it was an advantage to the estate; and that the plaintiff was too late in coming to the Court for compensation:—Held, that the acts complained of amounted*

to equitable waste, and that the plaintiff was fully justified in waiting till the death of the tenant for life before he filed his bill for compensation; that the length of time was no bar, and that the estate of the late duke was liable to account for all the profit received from those acts.

The particulars of this case and the judgment of the Vice Chancellor of England will be found reported in 15 *Law J. Rep.* (N.S.) Chanc. 351.

The defendants appealed from that decision.

Mr. Bethell and *Mr. Lloyd* appeared for the plaintiff, and

Mr. Stuart, *Mr. J. Parker*, and *Mr. G. L. Russell*, for the defendants.

In addition to the cases cited in the court below, the following were also referred to:—

The Marquis of Lansdowne v. *the Marchioness Dowager of Lansdowne*, 1 Jac. & Walk. 522; s. c. 1 Mad. 116.
Bishop of Winchester v. *Knight*, 1 P. Wms. 406.
Bennett v. *Colley*, 2 Myl. & K. 225.
Franco v. *Bolton*, 3 Ves. 368.
Harrison v. *Hollins*, 1 Sim. & Stu. 471.
Kemp v. *Westbrooke*, 1 Ves. sen. 278.
Nairn v. *Marjoribanks*, 3 Russ. 582.

Nov. 20.—The Lord Chancellor.—I have looked through the papers in this case, not from any doubt I entertained at the time of the argument, but in order to see whether anything else suggested itself beyond what had struck my mind at the time it was discussed. The result has only been to confirm me in the opinion I before entertained that there is no ground for appeal in this case. The fact of the title of the present Duke of Leeds to an account of the equitable waste committed by his father, who was tenant for life, he being the tenant in tail, is beyond all question—there is no doubt about that. There was the old family mansion-house standing in the park, which was pulled down, and the timber admitted (at least to some extent admitted) to be ornamental timber cut down by the father. Whether that was judicious management or not, whether it was for the benefit of the family or not, whether altogether it was a thing which a prudent manager of the estate would have done had he been the owner, is a matter about which I do not entertain any opinion. It is no answer at all to the tenant in tail, that the tenant for life thought it desirable and advisable, perhaps justly, to alter the nature of the property, and pull down the mansion-house and cut down the ornamental timber; it was doing that with another person's property which he had no right to do. Admitting all that, it gave a right to the tenant in tail to be reimbursed at the expense of other parties for the proceeds of that equitable waste. Therefore, there is no doubt whatever as to the general right of the present Duke of Leeds to compensation for the amount of the equitable waste so committed. The only question is, whether anything has happened which is to deprive him of damages for that equitable waste.

Now, the grounds on which it is put are these: not dealing with them exactly in the order in which they were put in the argument. The first is called acquiescence. Acquiescence is not quite the term which ought to be used. If a party, having a right, stands by and sees another dealing with a property in a manner in which he ought not, and does not interfere, that may be called acquiescence; that is, acquiescence while the act is in progress—he cannot complain of the act that was done with his own acquiescence. In that sense acquiescence has no application to the present case. It was all done when the present Duke of Leeds was a minor, and when, if he had knowledge or means of knowledge (and he does not appear to have been of an age to have had knowledge) nothing of acquiescence can be imputed to him. The defence ought therefore rather to be a release—an abandonment of the right—a right pre-existing, and afterwards actually abandoned. That he had a right when he came of age, at all events, to call for an account of this equitable waste cannot be disputed. There is no acquiescence in the act of equitable waste. There may be abandonment, there may be release, there may be such dealings with the tenant for life as to preclude the tenant in tail from calling for an account from the tenant for life: that cannot be called acquiescence, but the abandonment of the claim between the parties which would amount to a release of the

right which he had. Of that I see no symptom whatever. I see the only evidence that the present Duke of Leeds had any knowledge of such a claim as one which he had a right to assert, was what took place during the negotiation between the father and the son. If that negotiation was carried on to a conclusion, and there has been any arrangement of property consequent upon it, there is no doubt a proof of knowledge on the part of the son, of his claim against the father, which is not brought forward as a pecuniary claim, but an arrangement is taking place with the knowledge that there was that other claim outstanding, and that might as well have been urged as a release of the pre-existing claim. But the negotiation ended in nothing; there was no final compensation made; there was nothing done with the property as the result of that negotiation. It merely shews, that at that time this claim was known to subsist on the part of the present Duke of Leeds, and stated, at least, as a claim which he might have made, or might have put in force against the property of his father. Beyond that nothing took place. That cannot be said to amount to an abandonment and release of a previously existing equitable right.

Then, as to the compensation, that entirely fails; therefore it is not necessary to discuss what might or might not amount to compensation, by which I mean (because beyond that it cannot be argued) the application towards the estate of the tenant in tail of the proceeds of the equitable waste, either directly or immediately afterwards arising out of the prior transaction. On looking into the answer there is no evidence of any such application, and on looking at the evidence there is not such a thing even stated. There is no statement of the proceeds of the equitable waste having in any way been applied to the improvement of the tenant in tail's estate. That case entirely fails.

Nothing whatever remains but the question of time. Now, the question of time is one principally relied upon, and no doubt in point of lapse of time there are a great many years since the period when the equitable waste was committed. Clearly the lapse of time is nothing unless you trace the situation and circumstances of the parties in order to ascertain according to the rule of law the length of time which is to prevail against the claim of the tenant in tail. Two periods were stated: first, the time when the tenant in tail, the present Duke of Leeds, attained twenty-one, which, I think, was in the year 1819. There was nothing whatever at that time to shew even that he knew of his right. It is not a question, properly speaking, of knowledge, because, when the statutable time has run there is no exception to it, and no reason why the statutable time should not be applied, of course whether the party knew of his right or not. But here the answer to the objection, at least the argument as to time, is, that the property did not fall into possession until the year 1838. The tenant for life, who committed the waste, lived until 1838. If the plaintiff had died before his father there was nothing. He had a contingency dependent on the life of his father. On the death of his father in 1838 the estate vested in possession, and he then for the first time became entitled as tenant in tail to the proceeds of that part of the estate which had been improperly converted into money by the tenant for life.

Now I in vain asked for and listened to hear cases cited, to shew, under those circumstances, that the party whose estate is vested in possession on the termination of the estate for life was to be barred of his equity, if the tenant for life lived twenty years after the period when he committed the waste. No such case was produced; none certainly exists; the rule of law is quite the other way. We not only have the provisions of the last statute, but if that is objected to, we borrow the provisions of the earlier one. In the 3 & 4 Will. 4. c. 27. all the early sections, that is to say, the second, third, fourth, and fifth, apply more or less to the subject, and they all give to the tenant in tail the remedy from the time at which the estate vests in possession. Then, this is merely upon the provision of the statute, because, whether this be considered as within the statute, or whether it is only that equity follows the rule laid down applicable to a legal right, it would be strange indeed, if where a forfeiture has been permitted on a part of the estate, and the statute would have enabled the tenant in tail to claim the benefit of the forfeiture within twenty years from the time of his estate vesting in possession, he not being bound by the forfeiture—that the moment you convert a legal right into an equitable

right, which is the right of the tenant in tail against the commission of equitable waste, then the same limitations are not to take place: that is to say, if he is claiming part of the estate as having been forfeited, although twenty years before his own title vested in possession, he is not barred until twenty years after the estate has vested in possession; but if it be that part of the estate has been diverted from the purposes of the entail by means of equitable waste, that then he is to be barred from the time the waste is committed. The law being laid down by the statute, if equity is to follow the law, equity will take the same rule by which the statute lays down the law. A party complaining of loss to the estate by means of equitable waste, applies for relief within the time which the statute gives in the case of forfeiture, which would have entitled him to claim sooner, but which the statute says he is not bound to do. Then there is not only the statute, but there is the rule as laid down by Lord Hardwicke in *Kemp* v. *Westbrooke*, and the rule as recognized by Lord Brougham in *Bennett* v. *Colley*, leaving no doubt on my mind as to the rule that the time did not commence to run against the tenant in tail until the estate vested in possession, which was not until 1838.

Those are the only grounds on which this claim to compensation is resisted on the part of those who represent the estate of the tenant for life. I am of opinion that they all fail, and that the right is not barred by anything which has been subsequently done. I am therefore of opinion that the appeal must be dismissed, with costs.

M.R.
April 27, 28, 29; May 1; Nov. 7. } LANCASTER *v.* EVORS.

Debtor and Creditor—Administration—Suretyship—Liability—Reimbursement—Statute of Limitations—Lapse of Time—Notice—Heir-at-Law.

In January 1772 *certain real estates, belonging to Sir J. P. Pryce and Lady P. his wife respectively, were conveyed to Jaques and Hughes, upon trust to sell and pay off a mortgage debt of* 24,000*l. to Earl Temple, and certain other specified sums, including two debts due from him to J. and H, and out of the residue to pay other creditors of Sir J. P. P. In June* 1774, *under a decree made in a suit of* Earl Temple *v.* Pryce, *the mortgage debt of* 24,000*l. was satisfied out of the monies arising from the sale of estates of Sir J. P. P, and there remained in court in that cause the surplus, which, by investment and accumulation, now amounted to* 20,000*l. In* 1785, *an inquiry was directed in the same cause, on the petition of Jaques and others, as to the incumbrances on the fund in court, but the same was not prosecuted. Sir J. P. P. died in* 1776, *and Evors, his heir-at-law, entered into possession of his estates and bought up the incumbrances thereon, which had been the debts of Sir J. P. P, at a low price. Lady Pryce died in* 1805, *and a suit* (Burney *v.* Scott) *was instituted for the administration of her estate. Jaques and Hughes's debts were paid out of the proceeds of the sale of her estates, and the amount arising from Lady P.'s real estate was exhausted in payment of the incumbrances prior in date to Burney's:—Held, that Lady Pryce was only a surety for Sir J. P. P. under the deed of* 1772; *that, notwithstanding the lapse of time, Burney's executor was entitled to be paid his debt out of the fund in court, arising from the sale of Sir J. P. P.'s estates, and that the personal representative and devisee of Evors (Evors having died in* 1844) *was only entitled to be allowed the sums actually expended by Evors in buying up the incumbrances on the estates of Sir J. P. P.*

Held, also, that the surplus fund having remained in court, and Evors having, in 1840, *obtained an order for an inquiry as to the incumbrances on that fund, Burney's claim was not barred by the Statute of Limitations.*

The facts of this case are sufficiently set forth in the judgment of the Master of the Rolls. For the previous decisions in this suit on other points, vide 13 *Law J. Rep.* (N.S.) Chanc. 269; s.c. 1 *Phill.* 349. Vide also 4 *Beav.* 158.

Mr. Purvis and *Mr. Malins*, for the plaintiff, the legal personal representative of Burney, contended, that the Court would marshal the assets arising from the two estates of Sir John Powell Pryce and Lady

Pryce, and that the plaintiff was entitled to have the fund in court applied in reimbursing, to the extent of his claims, the amount paid out of the estate of Lady Pryce to Jaques and others, creditors of Sir J. P. Pryce, with interest thereon, from the date of such payment, together with the costs of the suit: and that the Statute of Limitations had no application to a case circumstanced as the present was, where proceedings had been in progress, in the cause of *Burney* v. *Scott*, ever since the year 1814.

The case of *The Earl of Kinnoul* v. *Money*, in the note to *The Earl of Buckinghamshire* v. *Hobart* (1), was cited on the part of the plaintiff.

Mr. Bagshawe appeared for the defendant Francis Morgan, the legal personal representative of John Morgan, the incumbrancer of Lady Pryce's estates.

Mr. Kindersley and *Mr. Lovat*, for the defendant Morley, the executor, and one of the devisees named in Evors's will; and

Mr. Turner and *Mr. Josiah Smith*, for the defendant Briscoe, the other devisee, contended, that the plaintiff was not entitled to be recouped out of the fund in court the amount of the debts of Sir J. P. Pryce that were alleged to have been paid out of the proceeds of Lady Pryce's estates, she, during her life, and her devisees in trust afterwards, having raised no objection to the payment of such debts out of her estates; that, by the deed of 1772, Lady Pryce accepted the sum of 5,000*l.* in full satisfaction of all her interest in the estates thereby conveyed (2); that the parties claiming through Lady Pryce and her estate were bound by her acquiescence in the proceedings of prior date, and that on the evidence adduced in the cause, the presumption was strongly against the validity of the debt claimed to be due from Sir J. P. Pryce to Jaques, the transaction between those parties being extremely suspicious in its inception, and no steps having been taken with reference thereto for so long a period; that the debt being a simple contract debt had been long since barred by the Statute of Limitations, and that the defendants were not bound by the proceedings that had been taken in the suit instituted for the administration of Lady Pryce's estate, no person having attended the same on behalf of Sir J. P. Pryce's estate; and that since the order of 1785, there was no trace of the debt claimed by Jaques.

Mr. Rasch and *Mr. Anstey* appeared for other parties, defendants in the cause.

Mr. Purvis, in reply.

The following cases were also cited in the course of the arguments:—

Bates v. *Dandy*, 2 Atk. 207.
Strachan v. *Brander*, 1 Eden, 303, 307.
Honner v. *Morton*, 3 Russ. 65.
1 *Roper's Husband and Wife*, 225.

The Master of the Rolls.—The plaintiff in this cause is the legal personal representative of John Burney, deceased, who was a judgment creditor of Elizabeth Lady Pryce, deceased. By his bill, he claims to be paid the debt due to him out of the estate of George Arthur Evors, deceased, who was the eldest surviving son of Diana Evors, and heir-at-law of Sir Edward Manley Pryce, and of Sir John Powell Pryce, who was the husband of Lady Pryce, and who died in her lifetime. The estates to which the transaction stated in the pleadings of this cause relate, consisted of three classes: estates in Berkshire, which were vested in Lady Pryce in fee simple; estates in Montgomeryshire, which were vested in Sir J. P. Pryce and Elizabeth, his wife, for their joint lives and the life of the survivor of them; and estates in Montgomeryshire, which were vested in Sir J. P. Pryce, in fee. In June 1765, the estates of Lady Pryce were conveyed to Francis Skryme in trust to sell; in a few days afterwards, they were conveyed by way of mortgage to one Barnardiston, to secure to him the payment of 5,500*l.* and interest. In the following month of January 1766, Skryme, the trustee for sale, contracted to sell the same estates to Bagnall for the sum of 9,250*l.*; Sir John and Lady Pryce disputed the validity of this contract, and a bill was filed for a specific performance of it by Bagnall, to obtain the transfer of Barnardiston's mortgage, and to enter into possession of the estate as mortgagee. Some time afterwards,—the particular time is not stated,—Sir John and Lady Pryce conveyed the estate which was vested in

(1) 3 Swanst. 202.
(2) See Maden v. Veevers, 5 Beav. 503; s. c. 12 Law J. Rep. (n.s.) Chanc. 38.

them for their lives, as a security for the payment of 1,800*l.*, or an annuity of 200*l.*, the title to which became vested in one Humphrey Humphries; and in August 1771, Sir J. P. Pryce's fee simple estates were conveyed to Earl Temple by way of mortgage, to secure to him the payment of 24,000*l.* and interest. There being a suit to determine the question as to Bagnall's purchase, it was doubtful whether Sir John and Lady Pryce were entitled to the equity of redemption of Lady Pryce's Berkshire estates, or to the surplus of the purchase-money which Bagnall had agreed to pay for the estate, after satisfying the mortgage which had been paid by him to Barnardiston. Sir J. P. Pryce owed 260*l.* to T. Jaques, and 240*l.* to J. Hughes, and he is said to have borrowed from Jaques and Hughes the sum of 3,000*l.*, and it was in this state of things that certain indentures, dated the 1st and 2nd days of January 1772, were executed by Sir J. P. Pryce of the first part; Sir J. P. Pryce and Dame Elizabeth, his wife, of the second part; and Jaques and Hughes of the third part; and thereby, after reciting to the effect I have stated, it was witnessed that Sir J. P. Pryce and Lady Pryce, in consideration of the premises, and of the further sum of 3,000*l.* to them paid by Jaques and Hughes, and also the sum of 260*l.* and 240*l.*, producing in the whole 3,500*l.* (the receipt of which was acknowledged,) conveyed the estates to Jaques and Hughes, upon trust that they, between that time and the 29th of September 1775, should out of the rents to be received, improve the estates for the benefit of Sir John and Lady Pryce, pay the interest to the incumbrancers, and pay the residue of such rents to Sir J. P. Pryce; and upon the 29th of September 1775, that they should sell the estates, and out of the money to arise by the sale, pay and satisfy the charge, namely, 24,000*l.* and interest, due to Earl Temple, 1,800*l.* and interest, or the annuity of 200*l.* payable to H. Humphries; the mortgage of 5,500*l.* before due to Barnardiston, the principal money and interest which would then remain due to Jaques and Hughes, and such other sums of money as before the sale Jaques and Hughes might, at the request of Sir J. P. Pryce, lend to him, or might by his order or direction, in writing, advance to any other person, together with such expenses and such stipend as therein mentioned, and after such payment, upon trust that Jaques and Hughes should, out of the residue of the money, discharge the debts of Sir J. P. Pryce to such of his creditors who should before the 29th of September 1775 agree to accept the same after payment of the incumbrances thereon, and agree to stay proceedings for the recovery of their respective debts, and after payment thereof, then in trust out of the residue of the money, to pay Lady Pryce, for her separate use, the sum of 5,000*l.*, subject to her own disposition and appointment, and independently of her husband; and it was declared and agreed, that the sum of 5,000*l.* was so secured in lieu or in satisfaction of the estate and interest of Lady Pryce in that part of the estate thereby realized, and she thereby agreed to accept the same accordingly.

In Trinity term, in the same year, 1772, Earl Temple filed a bill in this court against Sir J. P. Pryce and Lady Pryce, Jaques, and Hughes, and other persons, praying payment of his mortgage debt of 24,000*l.* with interest, or a sale of the estate; and by a decree, made on the 17th of February 1774, it was ordered that the estate, or so much of it as should be required for payment of the mortgage, should be sold, and if more than sufficient for that purpose should be raised, the surplus was to be paid into Court, with liberty for any parties interested to apply. The estates, or some of them, were sold under the decree, and an account appears to have been settled between Sir J. P. Pryce and Lady Pryce and Jaques, but before any report was made the suit abated by the deaths of Sir J. P. Pryce and Earl Temple. Sir John died in July 1776, having made a will, by which he appointed his sister, Mary Pryce, his executrix, and leaving his son, Sir E. M. Pryce, his heir-at-law; and Earl Temple died in 1779, having made a will, by which he appointed the Marquis of Buckingham his executor, and the suit having been revived, the Master made his report of the 17th of July 1782, and it thereby appeared that, after payment of the mortgage of Earl Temple, there was a surplus of the purchase-money of the

mortgaged estate which had been sold, to the amount of 2,821*l.* 11*s.* 1*d.* Pursuant to an order, dated the 28th of November 1782, that sum was brought into court, and under the decree any person interested therein was to be at liberty to apply to the Court.

In January 1785, Jaques alleged that he was entitled to be paid 1,500*l.* and interest out of the money, and two other persons, namely, Deffell and Brompton, alleged that they were entitled to be paid certain other sums. Petitions in support of these claims were heard on the 21st of January 1785, and an order was made referring it to the Master to inquire and state what incumbrances there were on the fund, and directing, in the mean time, that the funds should be invested and accumulated. The inquiry, directed by the order, has never been prosecuted, but the fund was invested, and has been accumulating, and it increased to the amount of more than 20,000*l.*, 3*l.* per cent. consolidated bank annuities, and was part of the estate of Sir J. P. Pryce. Sir E. M. Pryce, the heir of Sir John, devised his real estate to his right heir, who was D. Evors. She died in June 1806, leaving G. A. Evors, a defendant in this cause, her heir. There was for some time a doubt whether G. A. Evors had not an elder brother, who might have been the heir; but Mr. Evors, being in possession of the estates with that doubt respecting the state of his family, bought the several incumbrances thereon, which had been the debts of Sir J. P. Pryce, at a low price. In the meantime, the bill filed by Bagnall, for the specific performance of the agreement he had entered into with Skryme for the purchase of Lady Pryce's estates in Berkshire, was dismissed for want of prosecution. Bagnall died in 1804, leaving Lady Scott and Mrs. Windsor his co-heirs; Sir W. Scott and Mr. Windsor were his executors; and in June 1804, Burney and Morgan, who were creditors of Lady Pryce to the amount of 1,000*l.*, together with Lady Pryce, filed their bill against Sir W. and Lady Scott and Mr. and Mrs. Windsor, praying that the contract with Skryme might be rescinded; but Lady Pryce died in 1805, and soon afterwards Burney and Morgan filed their bill of revivor and supplement against the defendants to the original bill, and Sir J. Jackson, the devisee and executor of Lady Pryce, and thereby praying that all the debts of Lady Pryce might be paid out of Lady Pryce's Berkshire estate, or the purchase-money payable for the same. By the supplemental cause the object of that suit was so far altered, that it became a suit for the administration of the estate of Lady Pryce. On the 7th of March 1814, a decree was pronounced, and thereby it was decreed that the contract with Bagnall should be performed; and the Master was, amongst other things, to take an account of what was due to the plaintiff Morgan on his securities, and also an account of what was due to all other the creditors of Lady Pryce, and of other incumbrances on the estate, and to inquire into and state the priorities thereof. During the proceeding under this decree, the plaintiffs, Burney and Morgan, and the defendant, Sir J. Jackson, died; but the suit was revived, after the abatement so occasioned, and the proceedings in the Master's office were continued. It is now to be stated that T. Jaques, who was a party to the deed of 1772, and one of the petitioners in the suit of *Temple* v. *Pryce*, had, in January 1805, claimed to be paid a debt of 1,500*l.* and interest, out of the estate of Sir J. P. Pryce. He was one of the petitioners by whom the order of the 21st of January 1785, had been obtained, and who, under that order, was entitled to go in and establish his claim against the estate of Sir J. P. Pryce, and in the year 1790 he made a will, which was duly proved by J. Bowman, one of the executors; J. Bowman never prosecuted the order of January 1785, made in the cause of *Temple* v. *Pryce;* but twenty-five years after the death of his testator went in under the decree made in the cause of *Burney* v. *Scott*, and claimed to be entitled to payment of the sum of 1,500*l.* out of the estate of Lady Pryce, and the Master, by his report in that suit, dated the 8th of August 1831, found that there was in court, in respect of the purchase-money of the estates therein mentioned, the sum of 5,735*l.* 17*s.* 1*d.* bank 3*l.* per cent. annuities, and he found that there were several sums of money due to several persons, in the whole to the amount of 15,000*l.* and something more, as creditors of Lady Pryce, for principal and interest, in respect of their several debts, besides the sum of 4,727*l.* 4*s.* 10*d.*

due to F. Morgan, as the legal personal representative of J. Morgan; and (amongst other things) he found that there was due to S. Burney, as the legal representative of J. Burney, on a judgment, the sum of 1,000*l.*; and under a bond, dated the 24th of December 1804, in the penalty of 6,400*l.*, for securing the payment of 2,600*l.* and interest, including the 1,000*l.* due on the judgment; and he also found that there was due to the personal representative of Jaques, under the indenture of January 1772, the principal sum of 1,500*l.* and for interest in respect thereof, the sum of 3,754*l.* 8*s.* 3*d.*, making, in the whole, 5,254*l.* 8*s.* 3*d.*; and he also found that a debt of 240*l.* was due to the personal representative of Hughes, and that the sum of 4,729*l.* 0*s.* 4*d.* was due to J. H. Deffell, on mortgage.

By an order made on the 4th of December 1831, it was referred to the Master to ascertain the priorities of the charges on the estate of Lady Pryce; and the Master, by a subsequent report, dated the 7th of July 1832, certified that the debt due to the estate of Jaques, and to the personal representative of Hughes, was the first incumbrance on the estate, and the produce thereof. This report was confirmed by an order, dated the 21st of July 1832, by which it was ordered, that out of the 10,989*l.* 17*s.* 1*d.*, the fund then in court, the sum of 5,318*l.* 0*s.* 3*d.*, and also the sum of 5*l.* 15*s.* 6*d.*, with subsequent interest, should be paid to J. Bowman, the legal personal representative of T. Jaques, and the sum of 240*l.* should be carried over to the account of the legal personal representative of Hughes; and under this order, and out of the monies standing to the credit of the cause for administering the estate of Lady Pryce, the several sums of 5,318*l.* 0*s.* 3*d.*, 5*l.* 15*s.* 6*d.*, and 240*l.* were paid; and the order providing for these payments, and for payment of what was due to Deffell, directed that the sum of 537*l.* 11*s.* 8*d.*, being the residue of the fund in court, should be paid to F. Morgan, towards payment of 4,795*l.* 19*s.* 10*d.*, the debt found due to his testator J. Morgan. In this manner the whole of the estate of Lady Pryce, which was administered in the suit, was applied, without paying the whole of her debts, and particularly without paying any part of the amount of what was due on the bond of the 24th of December 1804, to the estate of J. Burney, from the estate of Lady Pryce. The plaintiff is now the legal personal representative of J. Burney, and appears to be entitled to the debt, which remained due to his estate from the estate of Lady Pryce; and he claims to have the amount paid out of the funds which were in court to the credit of the cause originally called *Earl Temple* v. *Pryce*. The fund constitutes part of the estate of Sir J. P. Pryce; and the plaintiff says, that the debts due to Jaques and Hughes were debts of Sir J. P. Pryce, and ought to have been paid out of his estate, and would have been paid out of his fund in that cause, if the order of January 1785 had been duly prosecuted; but, nevertheless, Lady Pryce, having by the deed of 1772, and, probably, by some subsequent act, rendered her estate liable to pay those debts, the persons to whom they were due had a right to be paid out of the estate; but that her liability, and the liability of her estate, could only be considered as in the nature of suretyship, and payment of the debts being primarily due from the estate of Sir J. P. Pryce, the principal debtor, and having in fact been paid out of the estate of one who was only a surety, the latter ought to be recouped and reimbursed out of the former to the extent to which Lady Pryce's estate was so applied, for the purpose of payment, to Morgan, of what remained due to J. Morgan on his mortgage, and next to pay what was due to the plaintiff. Mr. Evors, admitting, in the result, that he was the heir-at-law of Sir J. P. Pryce, and that the sum of 20,972*l.* in question was the accumulated surplus of the purchase-money, arising from a sale of part of Sir J. P. Pryce's real estate, after satisfying the mortgages thereon, and claiming to be entitled to the character of heir, if he had no other or better title (which, however, he claimed to have), insisted that Jaques and Hughes were not creditors of Sir J. P. Pryce, and that the debts (if any) were debts of Lady Pryce, who was alleged by him to have been a very extravagant person, having great power and influence over her husband, who was blind, and incapable of acting for himself, and in great pecuniary embarrassments, and likely to be imposed upon. There is no evidence of the supposed fact on which those suggestions are founded.

It appears, I think, sufficiently, that the debts were secured by the deed of January 1772, and that the debts ought to be considered as primary debts of Sir J. P. Pryce; and I must, under the circumstances of this case, presume that the deed of January 1772 was duly executed, and that the memorandum of February 1776 was duly signed by Sir J. P. Price; and there is no reason to conclude that the debt was the debt of Lady Pryce, though she executed the deed, and signed the memorandum of the account, stating the sum for which her estate was intended to be in part security; Mr. Evors next denies that Burney was a creditor of Lady Pryce, and has suggested circumstances (without, however, any proof thereof) from which he wishes it to be concluded that no consideration was given for the bond which Burney held: there being no evidence of the truth of such suggestions, and the debt having been duly established against the legal personal representative of Lady Pryce, I think, under the circumstances, I am bound to consider it, on this occasion, a good debt. Under these circumstances, and from the Master's report, it appeared, that, in consequence of the payment of debts, which were to come out of the estate of Lady Pryce, the debts of Lady Pryce, or at least this debt of Lady Pryce, has not yet been paid.

Mr. Evors then contends that the plaintiff came too late, and his claim ought to be barred by the lapse of time. It is not necessary to consider how this might have been if there had been no funds in court; but the surplus purchase-money of Sir J. P. Pryce's estate which remained after satisfying Earl Temple's mortgage, was paid into court in the year 1782. In 1785 there was a reference to the Master to inquire what were the incumbrances thereon. That order was not effectually acted upon until Mr. Evors himself applied to have the money paid to him, as the heir-at-law of Sir J. P. Pryce; and it was upon that occasion, and in the year 1840, that an order was made for an inquiry as to incumbrances. Under that order the plaintiff made his claim, which was rejected by the Master, as it is distinctly stated by one of the solicitors in the cause, on the ground that the claim was founded on an equity. The plaintiff very soon afterwards filed his bill to establish his equity; and I am of opinion that he is not precluded from relief by lapse of time. Lastly, Mr. Evors alleged, that having no notice of the plaintiff's claim against the estate of Sir J. P. Pryce, he purchased and caused to be assigned to himself various judgments and incumbrances upon the estate of Sir J. P. Pryce, to an amount exceeding the amount of the fund in court. But I conceive that this is not a case which is affected by notice: if it were, there seems to be some reason to think that Mr. Evors had notice of the circumstances under which the plaintiff's claim arises, and, for further satisfaction, I should direct an inquiry on the subject; but independently of any question of notice, it seems to me that we have to consider in what character Mr. Evors became entitled to the estates, and, if he became entitled as heir-at-law, what was the full amount and value of all his estates which he derived under the same title, and what was the amount of the money which he actually paid in satisfaction of the charges and incumbrances thereon. For this sum he would be entitled to priority before the plaintiff upon all the estates; and if the estates, exclusive of the particular portion against which the plaintiff's claim is made, should be insufficient to satisfy the money so paid, he would be entitled to priority in respect even of this particular fund.

Now, Mr. Evors became entitled as heir of D. Evors, and through her, as the heir of Sir E. M. Pryce, who was the heir, and took subject to the provisions in the will of Sir J. P. Pryce, as heir-at-law of Sir J. P. Pryce; and in his answer in this cause, Mr. Evors claims to be entitled to the estate as heir of Sir J. P. Pryce. This is, therefore, the case of an heir purchasing and procuring the assignment of debts and incumbrances on descended estates to himself for less than their full amount; he is entitled to the full benefit of all he paid, which, as against all the creditors of the estate, he is to have credit for; but he is to have credit for no more than he paid, and, on the whole, it appears to me that the sum claimed by Jaques, and paid to his legal personal representatives, was and ought to be considered as the debt of Sir J. P. Pryce, and due from his estate; that the same having been paid out of the estate of Lady Pryce,

her legal personal representative ought to be considered as a creditor against the estate of Sir J. P. Pryce for the whole amount thereof; that the money paid into court in the cause of *Earl Temple* v. *Pryce* was and ought to be considered as part of the real estate of Sir J. P. Pryce, and that Mr. Evors, as the heir-at-law of Sir J. P. Pryce, became entitled thereto, subject to the payment of the debts properly chargeable thereon; that Mr. Evors, having paid various charges and incumbrances upon the estate of Sir J. P. Pryce, whose heir he was, is entitled, as against the other claimants on the estate, to have credit for the whole amount of the purchase-money so paid, but not for any greater amount than he actually paid; that if the unsold estate of Sir J. P. Pryce, to which Mr. Evors became entitled as heir, were in value less than sufficient to satisfy all the sums paid by Mr. Evors, then he is entitled to be paid the residue out of the fund in court, in priority to the legal personal representative of Lady Pryce; but if the value of such estate exceeds the amount of the money so paid by Mr. Evors, then the legal personal representatives ought to be paid what is due to them out of the fund in the first place; and I, therefore, propose to declare that the plaintiff, as the legal personal representative of John Burney, is entitled to be paid what is due to him in that character out of the estate of Lady Pryce; and that the estate of Lady Pryce having been exhausted by the application of it in payment of the debts which were primarily due from Sir J. P. Pryce or his estate, but for which the estate of Lady Pryce is liable, the plaintiff is now entitled, out of the estate of Sir J. P. Pryce (subject to prior claims thereon, if any) to the extent to which the estate of Lady Pryce was applied in payment of the debts of Sir J. P. Pryce, to have the estate of Lady Pryce recouped in order that the same may be now applied in satisfaction of the debts remaining unpaid; and I must refer it to the Master to inquire and state to the Court what debts and sums of money, and to what amount, which were primarily due from Sir J. P. Pryce or his estate, were paid out of the estate of Lady Price under the decree for the administration of her estate; and let the Master inquire and state what estate Mr. Evors became entitled to as the heir-at-law of Sir J. P. Pryce, and what was the full amount and value thereof in the whole, and what charges and incumbrances the same were subject to, and what sums of money, and to what amount in the whole, were paid by Mr. Evors in or towards satisfaction of such charges and incumbrances, or any of them, or in purchasing the same, or in procuring the same to be transferred or assigned to any other person for his own use and benefit. With these inquiries I must reserve further directions and costs.

V.C.
Nov. 13. } HALL *v.* HUGONIN.

Baron and Feme—Reversionary Interest of Wife—Assignment—Chose in Action.

A married woman being entitled to a reversionary interest in a fund, and having had the prior life-interest therein assigned to her, the Court ordered the fund to be transferred to the husband, the wife appearing in court and consenting.

This bill was filed by William Hall and Caroline his wife, against the trustees of a fund of 2,514*l.* 16*s.* 11*d.*, 3¼*l.* per cent. bank annuities, in order to compel them to transfer that fund to the husband, under the following circumstances. By a settlement made upon the marriage of Mr. and Mrs. Edgar, a sum of 5,029*l.* 13*s.* 11*d.* was settled after the marriage, in trust for the husband for life; after his decease, in trust for the wife for life; and after the decease of the survivor, in trust for the children of the marriage; and if no child, then in trust for the wife absolutely, in case she should survive her said husband; but if she should die in her husband's lifetime, then as to part of the fund, in trust, as the said wife should appoint, and as to the whole fund, subject to any such appointment, in trust for the wife's next-of-kin, as if she had died unmarried. A reference was directed to the Master, who found that Mrs. Edgar had died without issue, and without having made any appointment, and that the plaintiff, Caroline Halsey Hall, wife of the plaintiff William Hall, was one of the two next-of-kin of Mrs. Edgar. The plaintiff, William Hall,

purchased the life-interest of Mr. Edgar, in the moiety of the fund; and by an assignment, dated in April 1845, the same was, at the request of the said William Hall, assigned to his said wife Caroline H. Hall, her executors, administrators, and assigns, to the intent that the same might merge and be extinguished in the immediate reversion, and that the reversion might thereby be reduced into possession: and that the said William Hall now claimed to have that sum transferred to him, Mrs. Hall appearing in court and consenting.

Mr. Bethell and *Mr. Oliver*, for the plaintiffs, contended, that the assignment of the life interest to the person entitled to the reversion in the fund, gave an absolute interest in possession, and that the husband and wife together (the wife appearing in court and consenting,) could deal with the fund: and cited the following cases, in which, under similar circumstances, the transfer had been ordered:—

Wilson v. *Oldham*, Vice Chancellor of England, 5th of March 1841, MS., cited by Mr. Lewin, in his book on Trusts, p. 297, 2nd edit.

Lachton v. *Adams*, 5 Law J. Rep. (N.S.) Chanc. 382.

Mr. Rolt and *Mr. Rendall*, for the trustees, submitted, that they could not safely transfer the fund, inasmuch as the Court never permitted a married woman to deal with her chose in action, and that the assignment was a mere contrivance to do that indirectly which the Court would not permit to be done directly. That a court of equity never recognized the doctrine of merger, and that the reversionary interest remained in equity, notwithstanding the assignment, in its former state. That a wife was never compelled to take a *damnosa hæreditas*, which this in effect was, as it affected her right by survivorship; and that she might, on becoming discovert, repudiate the assignment, and make the trustees liable.

The following authorities were cited:—

Doswell v. *Earle*, 12 Ves. 473.

Pickard v. *Roberts*, 3 Mad. 384.

Breton v. *Lord Clifden*, 1 Sim. & Stu. 363.

Story v. *Tonge*, 7 Beav. 91; s. c. 13 Law J. Rep. (N.S.) Chanc. 191.

Sheppard's Touchstone, c. 15.

The VICE CHANCELLOR (without hearing a reply).—Now take this case by steps—if a testator were to devise any species of equitable interest in personalty to a married woman, and on her death to her husband, and the husband and wife were to present a petition that the fund might be transferred to the husband or his nominees, and the Court took the wife's consent, would it be competent for the married woman, after her husband's death, to turn round and say, "I never accepted the property," and that the transfer was void? The question is, whether, in that case, the Court would not consider the matter transacted. I put a case, where the proceedings in court are the only evidence of acceptance by the wife. What I have to consider then is this, suppose a life interest in a chose in action given to a married woman, and the husband and wife want to deal with the fund, could the Court take the consent of the wife? Put the case of a bequest of stock by a father, in trust for his unmarried daughter Elizabeth for life, with remainder for his married daughter Ann. Immediately after his death, Elizabeth assigns her life interest to Ann. Then arises the question—not of merger, but whether, by the assignment, the entire interest in the fund had not become vested in Ann—that is, as well her original interest in remainder, as also the immediate interest on the determination of which that original interest was made expectant? If she so had the whole interest, is it not an interest with which she is as capable of dealing in this court, as if the whole interest had been originally given to her? My opinion is, that it is; and that, when the husband presents a petition that the fund should be transferred according to his direction, and the wife consents in court, the trustees will be perfectly safe in making the transfer accordingly; the wife by her consent having waived that claim to a settlement out of the fund which she might in its then position have maintained. It is, in my opinion, convenient that such should be the rule. This is in some respects an experiment, as there is no authority upon it; but I think that on principle the thing may be done.

K. BRUCE, V.C. Nov. 13. } WOODWARD v. MILLER.

Vendor and Purchaser—Specific Performance—Costs.

A suit was instituted by A, as vendor, against B, for the specific performance of a contract of sale of leasehold property. B, by his answer, stated that the sale had been made by auction, and insisted that A. was not entitled to a decree, on the ground that he had employed puffers at the sale. At the hearing of the cause, it was decided, that the case set up by B. was not a valid defence to the suit, and the usual reference was made to the Master. In the Master's office, an objection was made by B. to the title, which was at once removed by A. The Master found that A. had made a good title to the property, but had first shewn a good title in the Master's office. On the cause coming on for further directions, (on the ground that B. ought to have ended all litigation after the first decree):—Held, that B. ought to pay all the costs of the suit after the first decree.

This was a suit for the specific performance of a contract, made with the defendant, Mr. Miller, for the sale to him of a leasehold estate. Mr. Miller, by his answer, stated that the sale had been made by auction, and insisted that the plaintiffs had no right to a decree, on the ground, that they had employed puffers at the sale.

The cause was heard on the 6th of November 1845, and the case is reported, as to the question of puffing, in 2 *Coll.* 279; s. c. 15 *Law J. Rep.* (N.S.) Chanc. 6.

By the decree made at the hearing, the usual reference was made to the Master to inquire whether a good title could be made to the property; and, if so, when it was first shewn that a good title could be made; and further directions and costs were reserved.

It appeared, that by an indenture, dated in June 1839, Jolly and Marshall demised the property to Hiscock, for seventy years, and Hiscock covenanted (among other things) that he would insure the property in the Atlas Insurance Office. The lease contained the usual clause of forfeiture in the event of the non-performance of the covenants.

In the Master's office, the defendant objected to the title, on the ground that no evidence had been produced as to the fulfilment of the covenant as to insurance, or as to the waiver of the forfeiture, if the covenant had been broken. In answer to this objection, the plaintiffs produced a waiver from Marshall. It did not appear when they produced the waiver. On the 7th of February 1846, they produced a deed, dated November 30, 1839, (which date was previous to the date of the waiver,) by which Jolly released all his interest to Marshall.

The Master reported, that the plaintiffs had made a good title to the property, and that they had first shewn a good title on the 7th of February 1846, when an abstract of an indenture, dated November 30, 1839, was furnished to the defendant's solicitors.

The cause now came on for further directions. The only question that remained was, as to the costs of the suit.

Mr. Wigram and *Mr. De Gex*, for the plaintiffs, contended, that the plaintiffs were entitled to the costs up to the time of the first hearing, as the question raised by the defendant, with respect to the puffing, had been decided against him; and that, although the Master had reported that a good title was first shewn after the reference, they were entitled to the subsequent costs, as the puffing, and not the objection as to the breach of covenant, was the real question between the parties. The waiver and release would have been produced at any time to the defendant, if he had made any serious question as to the covenant. The whole matter might, but for the defendant's conduct, have been settled after the hearing, without going to the Master at all. They cited—

Scoones v. *Morrell*, 1 Beav. 251.
Taylor v. *Brown*, 2 Ibid. 180; s. c. 9 Law J. Rep. (N.S.) Chanc. 14.
Hyde v. *Dallaway*, 4 Beav. 606.

Mr. Bacon, for the defendant, contended, that under the circumstances stated at the former hearing, the plaintiffs ought not to have any costs up to that time; and that the subsequent costs ought to be paid by the plaintiffs, as they had only for the first time shewn a good title in the Master's office.

KNIGHT BRUCE, V.C.—I am of opinion, that the circumstances of this case are such as not to permit me to allow the costs on either side up to the first decree. As to the costs afterwards, although the title was not shewn until the parties came into the Master's office, my opinion is, that the defendant not appealing, or intending to appeal, against the decree, ought to have ended all litigation at once, and accepted the title, as shewn in the Master's office, without the expense of attending before the Master. I think, therefore, the costs of the suit, after the first decree to the present time, must be paid by the defendant. Up to the time of the first decree, there will be no costs on either side. All subsequent costs, if any, I reserve.

M.R.
Nov. 9, 10, 11, 14. } ROBINSON *v.* WALL.

Vendor and Purchaser — Specific Performance—Insolvent—Reserved Bidding—Contract for Sale, without Reserve—Costs.

C. having taken the benefit of the Insolvent Debtors Act, his assignees, with the consent of C's creditors, entered into an agreement with M, that he should pay 35,000l. for the purchase of the estate of C, and that the assignees should cause the sale to take place by public auction, without any reserved bidding, except the proposed bidding of 35,000l., and that if M. should, at such sale, bid the sum of 35,000l. or any higher sum, and there should be no bidding higher than his, the estate should be knocked down to him at such bidding of 35,000l.; but M. was not bound to make any higher bidding. Particulars and conditions of the sale of the estate were duly printed and circulated, stating that the same was to be sold without reserve. M's agent attended the sale, and also W, the agent of F, and many other persons. The estate was knocked down to F. at 50,000l., who, through his agent, paid a deposit of 5,000l., and signed the usual undertaking to complete his contract; the immediately preceding bidding of 49,800l., being made by M. F, at the time of the sale, knew that M. would bid 35,000l. for C.'s estate; but it did not appear that F. was acquainted with the agreement between M. and C.'s assignees:—Held, under the circumstances, that a bill by the assignees of C, seeking specific performance of the contract, could not be sustained; and the same was dismissed with costs; but F, by his answer, having repudiated the agency of W, who attended the sale, and bid on F's behalf, was ordered to pay the costs incident to the making of W. a party to the suit.

The bill was filed by J. T. Robinson and J. Gillett, the assignees appointed by the Insolvent Debtors Court, of Sir T. S. Champneys' estate, seeking specific performance by the defendant T. Flight of an agreement to purchase of the plaintiffs their interest (which was for the joint lives of Sir T. S. Champneys and Lady Champneys), in certain manors and hereditaments, situate in the counties of Chester, Denbigh, Carnarvon, and Flint, and also in certain sums of money, annuities, &c., mentioned in certain particulars and conditions under which the agreement was entered into. The conditions stated that the sale was to be by public auction, and without reserve. Sir T. Champneys first took the benefit of the Insolvent Debtors Act, in the year 1827, and again in 1835; and the plaintiffs were his assignees under the second insolvency, and had had conveyed to them, by the assignee Sturgis, under the first insolvency, all the estate and effects of the insolvent vested in Sturgis thereunder. In the year 1838, Lord Mostyn was desirous of purchasing the life interest of Lady Champneys in the premises, which she would be entitled to on surviving her husband, and also the interest which, during the continuance of the coverture of Sir T. and Lady Champneys, had passed to the plaintiffs as the assignees of Sir T. Champneys, principally with the view of concurring with his eldest son, Edward Mostyn Lloyd Mostyn, who was entitled in remainder, in barring the estate tail of the latter, and vesting the fee simple in Lord and Lady Mostyn, and their eldest son. Negotiations were commenced in the year 1838, for carrying out the object of Lord Mostyn, who made certain proposals to the plaintiffs and Lady Champneys; and on the 13th of August in that year an indenture (1) of that

(1) This deed and the other of the like date, will be found stated in the case of Yewens *v.* Robinson, 9 Law J. Rep. (N.S.) Chanc. 325; s.c. 11 Sim. 105.

date was executed, to which the plaintiffs Sir T. and Lady Champneys, and Lord Mostyn, and certain other persons, trustees, were parties, whereby, after reciting (amongst other things) that Lord Mostyn had made proposals for the purchase of the respective interests of the plaintiffs and Lady Champneys in the premises, for 35,000*l.*, and an annuity of 400*l.* a year to Lady Champneys, but that the plaintiffs were advised they had no power as regarded their interest to accept the same, and that it was their duty to make sale of their interest in the estates by public auction, and that they were willing to put up the same for sale by public auction, and to sell the same to Lord Mostyn if he should be the highest bidder at such sale; and that Lord Mostyn was willing to attend at such sale, and to bid the sum of 35,000*l.* for the purchase of such estate, on the understanding that if a higher bidding should be made at such sale the same should be accepted, and the plaintiffs should not, in that event, be required to accept the sum of 35,000*l.*: it was agreed that Lord Mostyn should, as the conditions for the purchase of the interest of Sir T. Champneys, his assignees and creditors, in the premises, pay the plaintiffs the sum of 35,000*l.*, and that the plaintiffs would permit such sale to take place without any reserved price, or bidding in the nature of a reserved price, save and except so far as the proposed bidding of the sum of 35,000*l.* by Lord Mostyn might be deemed a reserved price or bidding; and that if Lord Mostyn should at such sale bid the sum of 35,000*l.*, or any higher sum for such estate, and there should be no bidding higher than his, the said estate should be knocked down to him at such bidding of 35,000*l.*; but if such bidding of 35,000*l.* should not be the highest bidding at such sale, and Lord Mostyn should not think fit to make any higher bidding, then it was agreed that such estate should not be knocked down to him, and he should not be the purchaser thereof, or in any manner bound by any of the covenants and agreements therein contained; and Lord Mostyn undertook to bid at the sale, subject to the conditions and stipulations therein contained, the sum of 35,000*l.* for the purchase of the estate of the plaintiffs, including the surplus of certain stock and monies therein mentioned: but if the bidding of 35,000*l.* should not be the highest at such sale, the said indenture should be thereupon (at the option of the said Lord Mostyn) null and void, to all intents and purposes whatsoever. And it was by the same indenture provided, that Lord Mostyn should not be bound by any particulars or conditions of sale which might be prepared by or on behalf of the plaintiffs, for the purpose of the sale by auction, differing in any respect from the terms and agreements therein contained, unless a copy of such particulars and conditions should previously to such sale be signed by him or his solicitors.

At a meeting of the creditors of Sir T. Champneys, on the 1st of October 1838, their assent to the sale was duly obtained; and it was at the same time agreed that the sum of 35,000*l.* should be fixed as the reserved bidding. The two proposals of Lord Mostyn for the purchase of the plaintiffs' and Lady Champneys' interests in the estates, &c. were to form one entire contract. Particulars and conditions of the said intended sale by auction were then prepared, and a copy thereof, previously to such sale, was submitted to the solicitors of Lord Mostyn and Lady Champneys, who made certain alterations therein, and laid the same before their counsel for perusal, who also made alterations therein, and afterwards approved thereof on behalf of Lord Mostyn and Lady Champneys, as follows, viz.:—"I have perused and settled this draft; and as far as I can understand it from recollection, and without the agreement, &c. before me, I approve thereof on behalf of Lord Mostyn and Lady Champneys." The sale took place by public auction, subject to those particulars and conditions, on the 10th of November 1838, when the plaintiffs' interest in the premises was knocked down to Wall, the agent of T. Flight, as the highest bidder, at 50,000*l.*, Lord Mostyn having bid at the sale the sum of 49,800*l.* A correspondence at great length then arose between the plaintiffs' solicitors and the solicitors of Wall, the agent of Flight, with reference to the title, during which, and within twelve months after the sale, Sir T. Champneys died. Flight thereupon, in the name of his agent, Wall, brought an action against the auctioneer for the reco-

very of the amount of the deposit-money (5,000*l.*) paid in respect of his purchase, upon which the plaintiffs filed the present bill.

The plaintiffs, after the date of the contract, sold part of the real estates to the Chester and Crewe Railway Company, under the compulsory clauses of an act of parliament obtained by that company; and they also filed a bill against Lady Champneys, to compel a specific performance of a contract by her for the purchase of the same estates, under another indenture, dated the 13th of August 1838, whereby Lady Champneys agreed to give 35,000*l.* for the premises, in case the purchase by Lord Mostyn should not take place, or should not be completed, either by reason of the decease of Sir T. Champneys in the lifetime of Lady Champneys, or from any other cause whatsoever. That suit was afterwards compromised, with the assent of the creditors of Sir T. Champneys, by the payment to the plaintiffs of 21,500*l.* by Lady Champneys, towards satisfaction whereof the stock and cash in the Court of Chancery standing to the credit of the cause *Sturgis* v. *Champneys*, and also in the Insolvent Debtors Court, was agreed to be applied. The benefit of the contract with Flight was offered to be assigned to Lady Champneys, but she declined to accept it, and left it to his assignees to prosecute. The judgment, however, of the Master of the Rolls proceeded exclusively on the terms of the contract entered into between the plaintiffs and Lord Mostyn, and the circumstances relating thereto.

Mr. Kindersley and *Mr. Chandless*, in support of the bill, contended that nothing had occurred to release the defendant Flight from his contract, and that he was not in a worse situation because Lord Mostyn had bid 35,000*l.*; that the only reserved bidding that existed was the sum of 35,000*l.*, which Flight knew would be bid by Lord Mostyn, and which it was now unnecessary to consider, the biddings having gone so far beyond that sum; and that if by reason of the fact not having been put in issue until the last moment, or any other circumstance, proof was not found that the printed particulars and conditions of sale had been signed by Lord Mostyn or his solicitors, an inquiry (having regard to the answer to the bill of discovery of the defendant Flight) ought to be directed by the Court into that fact.

Mr. Turner, *Mr. R. Roupell*, and *Mr. Rogers*, for the defendant Flight, contended that by the terms of the agreement between the plaintiffs and Lord Mostyn—which must be construed strongly against the vendors—the latter was to have an absolute and unqualified title if he became the purchaser at the sale at 35,000*l.*, and was not to be subject to the printed conditions of the sale at the public auction; that the fair construction of the agreement was, that if Lord Mostyn should bid at the sale a larger sum than 35,000*l.*, he should not be bound to give more than that sum for the property, which was fraudulent, that agreement being wholly unknown to the public; that Flight, and the other parties attending the sale, would naturally suppose Lord Mostyn was bidding for the property subject to the printed conditions of sale, and would be much influenced by the biddings of Lord Mostyn, to whom the property was more desirable and valuable than to any other person present at the sale; that the Court could not first rectify the agreement entered into, and then direct the same to be carried into effect; that it was not sufficient to give information to Flight that Lord Mostyn would bid 35,000*l.* at the sale for the estate; that the information so given should have gone farther, and stated the provisions of the deed under which the bidding of 35,000*l.* was intended to be made by Lord Mostyn; and that the omission to do that was tantamount to a misrepresentation of the real facts, the defendant having been kept in entire ignorance thereof until the discovery of all the circumstances was made by the production of the deed of the 13th of August 1838, in the answer to the bill of discovery filed by Flight against the plaintiffs; that the plaintiffs had waived the right to enforce the contract against the defendant by the voluntary sale of part of the property to the Chester and Crewe Railway Company, and had, in absolute derogation thereof, withdrawn the stock and other funds, part of the subject-matter of the contract; and that the bill was, in reality, one seeking payment of a sum of money, and nothing less—specific performance, under the circumstances, being quite out of the question.

Mr. Kindersley, in reply.

The following authorities were cited in the course of the arguments—

Wright v. *Maunder*, 4 Beav. 512.
Wheeler v. *Collier*, Moo. & Mal. 125.
Knatchbull v. *Grueber*, 3 Mer. 124, *vide* p. 144.
Harnett v. *Yeilding*, 2 Sch. & Lefr. 549.
Cadman v. *Horner*, 18 Ves. 10.
Davis v. *Symonds*, 1 Cox, 402.
Viscount Clermont v. *Tasburgh*, 1 Jac. & Walk. 112.
Meadows v. *Tanner*, 5 Mad. 34.
The King v. *Marsh*, 3 You. & Jer. 331.
Withy v. *Cottle*, 1 Sim. & Stu. 174; s. c. 1 Law J. Rep. Chanc. 5.
Doloret v. *Rothschild*, 1 Sim. & Stu. 590; s. c. 2 Law J. Rep. Chanc. 125.

The Master of the Rolls, after stating the facts, observed, that it had been urged in argument, that the reservation of the sum of 35,000*l.* was not intended as a reserved bidding, but only to secure the sale of the estate to Lord Mostyn, the conditional vendee, in case no higher sum should be offered at the sale; whether this was to be considered a reserved bidding seemed doubtful to his Lordship; but it seemed to have been clearly considered a reserved bidding by the assignees, and it was stipulated that there should be no other. In the deed of the 13th of August 1838, having reference to the agreement between the plaintiffs and Lord Mostyn, there was this extraordinary provision, viz. that if Lord Mostyn bid the sum of 35,000*l.* or any higher sum, and there should be no higher bidding than his, the estate should be knocked down to him at such bidding of 35,000*l.*, and that he should be released from his contract if there was any higher bidding than 35,000*l.*, so that the words contained in the agreement were repugnant. All this took place after full explanation of the insolvent's estate and interest, and it must be considered that the reserved bidding determined upon at the meeting of creditors in October 1838, had reference to the contract entered into with Lord Mostyn, and that the bidding in question might be made by Lord Mostyn at the sale. It was clearly expressed in the conditions of sale, which were printed and circulated, that the property was to be sold without reserve. The conditions of sale were special, though not in all respects so; and at the sale it was said, there were many biddings made, and that Lord Mostyn bid to the extent of 49,800*l.*, and that Flight bid 50,000*l.* On the death of Sir T. Champneys, the interest of the plaintiffs in the estates ceased. The object of the bill was to compel the defendant Flight to pay a large sum of money for a small consideration. Performance of the contract was resisted on divers grounds: one was because it was represented that the sale was to be made without reserve, and no mention was made of the agreement with Lord Mostyn, by which a sum of 35,000*l.* had been previously agreed upon as a reserved bidding; another ground was, that the parties did not bid at the auction on equal terms, but on unequal terms; by which, advantage was given to Lord Mostyn through a previous arrangement entered into between him and the vendors. It was said, that the counsel of Lord Mostyn approved of the conditions of sale, but that such approval could not be offered in evidence on behalf of the plaintiffs, on account of that circumstance having been put in issue only at the last moment. His Lordship's opinion was, that whilst the deed of the 13th of August 1838 was in force, the sale ought not to have been made without reserve. The estate was to be sold in any event, either to Lord Mostyn or a higher bidder, and, by a reserved bidding, it was meant to keep up the price, or to prevent a sale except at a certain price; and it did not appear to make any substantial difference, whether this was accomplished by means of an agent or by a principal, who had entered into a contract with the vendors. Lord Mostyn might be in fair competition with the other bidders at the sale, after the biddings had reached the sum of 35,000*l.*; but the auction seemed to have commenced in error, and there was a sale effected with a reserved bidding, notwithstanding the sale professed to be made without reserve. The auction was not so ordered that the Court could decree a specific performance on it, and on the grounds already stated, without entering into the consideration of the other objections taken by the defendants, the bill must be dismissed. As regarded costs, they were usually, in a case like the present, paid by the plaintiff, when the bill was dismissed; the defendant Flight, however, was

bound by the contract entered into by the defendant Wall, who, it was now admitted, was the defendant Flight's agent, at the sale, although the defendant Flight, by his answer, stated that he was not bound by the contract entered into by Wall. Under these circumstances, the defendant (Flight) must pay the costs incurred, by reason of Wall having been made a party to the suit; and such costs, when ascertained, must be deducted from the costs to be paid to the defendant Flight.

WIGRAM, V.C. Nov. 12, 14. } WOOD *v.* MACHU.

Vendor and Purchaser—Specific Performance—Reference as to Title on Motion—Question of Title or of Contract—Rescinding Contract.

After answer to a bill by a vendor, for specific performance, a reference as to title was directed upon motion, notwithstanding the answer stated that the time for completing the contract had long since expired, and that the vendor had not complied with the requisitions on the abstract, and that the purchaser had given notice of rescinding the contract.

Where the dispute is as to the application of conditions of sale, and the propriety of the conditions is undisputed, the question is one of title, and not of contract.

Where time is not originally of the essence of the contract, a purchaser cannot rescind the contract without notice, or before the expiration of his notice, on the ground of delay on the part of the vendor in complying with his requisitions of title.

This was a bill by a vendor for specific performance, and the answer having been put in, a motion was made on behalf of the plaintiff for the usual reference for title. On the 11th of December 1845 the estate in question was put up for sale by auction, and the defendant was declared the purchaser, and signed the usual memorandum. By the conditions of sale, the purchase was to be completed on the 25th of March 1846, and interest was to be paid on the purchase-money from that date. By the fourth condition, the vendor was to deliver an abstract within twenty-one days; and within fourteen days from that time the purchaser was to deliver his objections, if any, to the title; or otherwise the title was to be considered as accepted. By the sixth condition it was provided that the purchaser should not require the production of any deeds or documents not in the possession of the vendor, and that the expense of procuring the evidence of title other than that in the vendor's possession, should be borne by the purchaser. By the last condition of sale it was stipulated, that if the purchaser should fail to comply with the previous conditions, or either of them, his deposit should be forfeited to the vendor for damages, and that the vendor should be at liberty to re-sell the purchased premises, and that the loss incurred upon such re-sale should be paid by the purchaser. The abstract was delivered by the vendor, and the requisitions of the purchaser were sent in within the stipulated time.

The answer stated that none of the requisitions had been satisfactorily complied with, and that a correspondence between the respective solicitors as to the title, had been continued until the 24th of March 1846; that on the 24th of March the solicitor of the purchaser wrote to the solicitor of the vendor to the effect, that if the required evidence were not furnished within fifteen days from that date, his client would consider the contract as at an end. The correspondence as to the title was continued up to the 3rd of June following, when the purchaser's solicitor wrote to the vendor's solicitor a letter, which, after stating certain requisitions to be complied with, concluded as follows:—"We give you notice, that unless you evidence your client's title within fourteen days from the date hereof, we shall be under the necessity of commencing legal proceedings to recover back the deposit, with interest and costs." On the 5th of June the purchaser's solicitor again wrote to the vendor's solicitor as follows:—"I have to acknowledge the receipt of your letter of the 4th inst., in reply to mine of the 3rd, to which I beg leave to refer; and although it may be unnecessary to give you any further or more formal notice on the subject, merely for the sake of regularity I beg leave to state, that unless you evidence your client's pedigree in every respect required by my said letter on

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Wright v. *Maunder*, 4 Beav. 512.
Wheeler v. *Collier*, Moo. & Mal. 125.
Knatchbull v. *Grueber*, 3 Mer. 124, *vide* p. 144.
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bound by the contract entered into by the defendant Wall, who, it was now admitted, was the defendant Flight's agent, at the sale, although the defendant Flight, by his answer, stated that he was not bound by the contract entered into by Wall. Under these circumstances, the defendant (Flight) must pay the costs incurred, by reason of Wall having been made a party to the suit; and such costs, when ascertained, must be deducted from the costs to be paid to the defendant Flight.

WIGRAM, V.C. Nov. 12, 14. } WOOD *v.* MACHU.

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Where the dispute is as to the application of conditions of sale, and the propriety of the conditions is undisputed, the question is one of title, and not of contract.

Where time is not originally of the essence of the contract, a purchaser cannot rescind the contract without notice, or before the expiration of his notice, on the ground of delay on the part of the vendor in complying with his requisitions of title.

This was a bill by a vendor for specific performance, and the answer having been put in, a motion was made on behalf of the plaintiff for the usual reference for title. On the 11th of December 1845 the estate in question was put up for sale by auction, and the defendant was declared the purchaser, and signed the usual memorandum. By the conditions of sale, the purchase was to be completed on the 25th of March 1846, and interest was to be paid on the purchase-money from that date. By the fourth condition, the vendor was to deliver an abstract within twenty-one days; and within fourteen days from that time the purchaser was to deliver his objections, if any, to the title; or otherwise the title was to be considered as accepted. By the sixth condition it was provided that the purchaser should not require the production of any deeds or documents not in the possession of the vendor, and that the expense of procuring the evidence of title other than that in the vendor's possession, should be borne by the purchaser. By the last condition of sale it was stipulated, that if the purchaser should fail to comply with the previous conditions, or either of them, his deposit should be forfeited to the vendor for damages, and that the vendor should be at liberty to re-sell the purchased premises, and that the loss incurred upon such re-sale should be paid by the purchaser. The abstract was delivered by the vendor, and the requisitions of the purchaser were sent in within the stipulated time.

The answer stated that none of the requisitions had been satisfactorily complied with, and that a correspondence between the respective solicitors as to the title, had been continued until the 24th of March 1846; that on the 24th of March the solicitor of the purchaser wrote to the solicitor of the vendor to the effect, that if the required evidence were not furnished within fifteen days from that date, his client would consider the contract as at an end. The correspondence as to the title was continued up to the 3rd of June following, when the purchaser's solicitor wrote to the vendor's solicitor a letter, which, after stating certain requisitions to be complied with, concluded as follows:—"We give you notice, that unless you evidence your client's title within fourteen days from the date hereof, we shall be under the necessity of commencing legal proceedings to recover back the deposit, with interest and costs." On the 5th of June the purchaser's solicitor again wrote to the vendor's solicitor as follows:—"I have to acknowledge the receipt of your letter of the 4th inst., in reply to mine of the 3rd, to which I beg leave to refer; and although it may be unnecessary to give you any further or more formal notice on the subject, merely for the sake of regularity I beg leave to state, that unless you evidence your client's pedigree in every respect required by my said letter on

or before the 20th of June inst., I shall treat the contract as abandoned, and bring an action to recover back the deposit-money, with interest and costs." The correspondence between the respective solicitors was continued up to the 15th of June. The defendant, by his answer, submitted that under the circumstances he was justified in rescinding the contract; but if the Court should think otherwise, he claimed the right, if necessary, of taking further objections to the title. On the 18th of June the purchaser brought an action for the recovery of his deposit, and on the 3rd of July the present bill was filed by the vendor for a specific performance of the contract, and for an injunction to restrain the proceedings in the action.

Mr. Romilly, for the motion.

Sir F. Simpkinson and *Mr. Rudall*, contrà, contended that the motion was premature; and that the answer having raised a material issue as to the liability of the defendant to perform his contract, that question must be decided by the Court before a reference for title could be directed—

Page v. *Adam*, 4 Beav. 269; s. c. 10 Law J. Rep. (N.S.) Chanc. 407.
Blyth v. *Elmhirst*, 1 Ves. & Bea. 1.
Gordon v. *Ball*, 1 Sim. & Stu. 178.
Hyde v. *Dallaway*, 4 Beav. 606.

Nov. 14.—WIGRAM, V.C. (after stating the facts of the case, and that if time had originally been of the essence of the contract it had been waived by the correspondence between the parties down to the month of June 1846, proceeded as follows):—The defendant insists, that inasmuch as he has by his answer taken an objection to the performance of the contract upon other grounds than that of title, the Court cannot dispose of the objection before the hearing, and that no reference can be made upon motion in this cause. Undoubtedly, where performance of the contract is resisted upon other grounds than defect of title, and the objection appearing upon the answer is substantial, the Court cannot upon motion refer the question of title to the Master, but must first hear the cause, and dispose of the preliminary objection. There is very high authority for saying, that even if the objection be frivolous, the Court will not consider it upon motion. But since the decision in the case of *Withy* v. *Cottle* (1), the practice of the Court has certainly been to look into the answer, for the purpose of seeing whether that which the defendant calls an objection to the performance of the contract upon grounds other than defect of title, is or is not a substantial question. I state it in that way, because the question may be so concluded by authority that it may be frivolous to take the objection, however the case may have been at one time open to argument. Such is the result of my experience as to the practice of the Court, and such appears also to have been the opinion of a very experienced Judge, in the case of *Boyes* v. *Liddell* (2). The question always to be asked is, not whether the Court, having the question before it, will decide it one way or another at the hearing, but whether the objection is one which is concluded by authority. However that may be, it is, at all events, clear, that the Court must look into the answer to see whether the objection be or be not a question of title. By a question of title in these cases, I understand that which can only properly become the subject of adjudication upon investigation of the title. If the conditions of sale, so far as they impose conditions respecting the title, had been objected to by the answer, that might have been a question to be disposed of before directing a reference as to title. But if, as in this case, the conditions of sale are admitted to be proper, and the only question is as to the application of those conditions, it is only in the investigation of the title that the matter in dispute can be properly adjudicated upon. I might in this case give an opinion upon the specific point which has already become the subject of dispute between the parties; but where it is open to the defendant, as he contends, by his answer, to raise further objections, it is impossible for the Court usefully to entertain the question. I cannot agree with Sir F. Simpkinson, that this is not a question of title, merely because it seeks to invalidate the special conditions as to the manner in which the title is to be made out. Now, the only other point is this, that in a case where time originally was not of the essence of the

(1) Turn. & Russ. 78; s. c. 1 Law J. Rep. Chanc. 407.
(2) 1 You. & Coll. C.C. 133.

contract, the parties, after the expiration of the time fixed for the completion of the contract, have gone on with the investigation of the title without interruption. On the 18th of June, without any previous notice applicable to that day, the defendant declared the contract at an end, by bringing an action for the deposit; whereupon the bill was filed. Now, that the purchaser has not a right so to determine the contract in a case like this, has been so repeatedly and so solemnly decided, and is so completely settled by authority in the simple case which this answer presents, as to be no longer open for argument. I give no opinion as to what my decision would have been had the action been brought after the 20th of June, though I do not think my conclusion would have been different. There must be the usual reference as to the title, with the addition, in this case, that the Master must have regard to the conditions of sale.

L.C. Nov. 10. } GOMPERTZ *v.* GOMPERTZ.

Legacy—Construction.

A testator directed his residuary personal estate to be divided into shares, of which each of his sons was to have two, and each of his daughters was to have one. What he gave to his daughters was to be in this manner: each of them was to have the interest during her life, and after her death it was to go to her lawful heirs:—Held, that, upon the death of one of the daughters, without issue, her share formed part of the residue of the testator's estate, not disposed of by his will, and did not belong to the personal representative of the deceased daughter.

The question in this cause arose upon the residuary clause in the will of Ephraim Gompertz. The will and the decision of the Vice Chancellor of England will be found reported in 14 *Law J. Rep.* (N.S.) Chanc. 442. Mr. Hollander appealed from that decision.

Mr. Walker and *Mr. Twells* appeared for the plaintiffs, and

Mr. Anderdon, Mr. E. F. Smith, and *Mr. Sidebottom,* for some of the defendants, in support of the decree.

Mr. James Parker and *Mr. Speed,* for the appellant.—Where a parent bequeaths a sum absolutely to a child, and then adds a direction that the sum shall be settled upon that child for life, with remainder to the issue, the original gift is only modified to let in the settlement; and if there should be no issue to take the sum, the child of the testator becomes entitled to it absolutely under the original bequest. This principle was adopted in the cases of *Whittell* v. *Dudin* (1), *Mayer* v. *Townsend* (2), *Campbell* v. *Brownrigg* (3), and *Hulme* v. *Hulme* (4). In this will the appropriation of one share of the residue for the testator's daughter, Mrs. Hollander, amounted to a positive gift to her of that share, and then it was afterwards subjected to the direction that she should have the interest only for her life, with remainder to her "lawful heirs," which the decision of Lord Eldon determined to mean children; and as she had no children, her representative is entitled to the share under the words of the original absolute gift.

The LORD CHANCELLOR (without hearing a reply).—I think the Vice Chancellor has put the right construction upon this will, and that, in default of children of Mrs. Hollander, the principal was, after her death, undisposed of.

The cases which have been cited have all proceeded on the same principle. In all of them there was a gift, and then a direction as to the way in which the sum given was to be laid out—there was not anything which amounted to a qualification of the gift; but the testator pointed out the mode in which it was to be enjoyed. But, in this case, the original gift itself has a limitation, and when the purposes and objects of the gift so limited have been exhausted, the rest remains undisposed of, and continues part of the testator's estate.

If the will had contained no gift or direction, except what could be found in the first part of the will, the question might have been more difficult. The testator first speaks of a share for each of his daughters; but he afterwards proceeds to state what his inten-

(1) 2 Jac. & Walk. 279.

(2) 3 Beav. 443; s. c. 10 Law J. Rep. (N.S.) Chanc. 216.

(3) 1 Phil. 301; s. c. 13 Law J. Rep. (N.S.) Chanc. 7.

(4) 9 Sim. 644.

tion was respecting those shares: "What I give to my sons and daughters of the residue, it is my will to be in this manner: my daughters only to have the interest of the one share, or of the 3,000*l.* during their lives, and after their deaths shall become to their lawful heirs, and one share of the two shares of each of my sons of the residue shall only have the interest of their one share during their lives, and after their deaths, shall become to their lawful heirs." In a subsequent part, "My sons shall have time to consider, three years, if they will give my daughters one share or 3,000*l.* each, which is meant the interest of the said sums only;" which amounts to this, "I give the *interest* only to my daughters." Then, in the note added to the will, he says, "The two shares of my sons of the residue, is meant one at their own disposal, and the one share only the interest during their lives; and my daughters only the interest of their one share of the residue, or of the 3,000*l.* of the residue." The testator has in all these instances expressed his intention that the daughters should take the interest only for their lives; if they leave children, their children will become entitled. There is no gift which is absolute in the first instance, but cut down by a direction as to the mode of enjoyment; but the testator points out the precise interest which the legatees are to take originally.

I think, therefore, that the Vice Chancellor was right in his decision in this case, and the appeal must be dismissed. The costs would, of course, follow the result of the appeal; but as all parties consent to such an arrangement, they may be paid out of the fund.

L.C. Nov. 11. } COOPER *v.* PITCHER.

Legacy—Gift for Life, with Gift over, in failure of Issue—Implication.

A testator bequeathed a sum of money to his wife's nephew for life, and if he should die in the testator's lifetime, without issue, then he gave the same to other parties. The nephew died in the life of the testator, leaving issue:—Held, that such issue was not entitled, by implication, to the legacy.

A testator, by his will, dated in 1836, bequeathed a sum of 4,200*l.*, upon trust as to 700*l.*, being one-sixth part, for his wife's nephew, George Cooper, for his life. The testator shortly afterwards made a codicil, in which he referred to the gift of 4,200*l.*, and then proceeded as follows:—"Now, I do hereby declare my mind and will to be, that in the case of the death of any one or more of my said wife's nephews and nieces, in my lifetime, *without issue*, the share or shares of and in the said sum of 4,200*l.* of such one or more of them as shall so die in my lifetime, without issue, shall go and be paid to the survivors or survivor of them in equal proportions." George Cooper died in the lifetime of the testator, leaving one child only, an infant daughter, who was the plaintiff in this suit; and the testator died in 1838. The question was, whether the child of G. Cooper was entitled to the 700*l.*, or whether it sank into the residue. The executor had, for several years after the death of the testator, paid the interest on the 700*l.* to the mother of the plaintiff, upon the supposition that the plaintiff was entitled to that sum. The Vice Chancellor Wigram was of opinion that there was no gift by implication, and, consequently, that the plaintiff was not entitled to the legacy; but ordered her costs to be paid out of the fund, which costs were to be set off against the amount paid to the plaintiff's mother for interest on the 700*l.* The plaintiff appealed from that decision.

Mr. Romilly and *Mr. E. Montagu*, for the appellant, contended, that under the gift over, in default of issue of George Cooper, his issue took by implication. In *Greene* v. *Ward* (1) the circumstances were different, and no cases appear to have been cited in the argument of that case.

Ex parte Rogers, 2 Mad. 449.
Newland v. *Shephard*, 2 P. Wms. 194.
Bibin v. *Walker*, Amb. 661.
White v. *Barber*, Ibid. 701.
Roe d. *Bendale* v. *Summerset*, 5 Burr. 2608.
Goodright d. *Hoskins* v. *Hoskins*, 9 East, 306.
Lethieullier v. *Tracy*, 3 Atk. 728.
Blackwell v. *Bull*, 1 Keen, 176; s. c. 5 Law J. Rep. (N.S.) Chanc. 251.
Bird v. *Hunsdon*, 2 Swanst. 342.

(1) 1 Russ. 262; s. c. 4 Law J. Rep. Chanc. 99.

Mr. Anderdon and *Mr. Batten*, for the executor of the testator. — In *Ex parte Rogers* the petitioners were the personal representatives of the mother, and they took in that character, not under their title as children. That case is explained in *Jarman on Wills*, vol. 1. p. 500.

[The Lord Chancellor.—If the report of that case is correct in 2 *Mad.* 455, Sir Thomas Plumer has laid down a proposition which is directly contrary to the law.]

If real estate is given to A. for life, and if he dies without issue, then to B, if A. happens to be the heir of the testator, A's children take; but if he is not the heir, his children take nothing. *Greene* v. *Ward* appears, from a statement in *Ranelagh* v. *Ranelagh* (2), to have been appealed from, and affirmed by Lord Lyndhurst.

Gardner v. *Sheldon*, Vaugh. 259, and 1 Eq. Ca. Abr. 197.

Doe d. *Rew* v. *Lucraft*, 8 Bing. 386; s. c. 1 Law J. Rep. (N.S.) C.P. 109.

The Lord Chancellor. — If I entertained any doubt on this case, I would take time to consider it. The rule which lets in the party, after whose death some one is to take, is good in the case of the heir, but it is not good in other cases. The parent has an estate for life, and if the parent dies without issue, it is given over to some one else. The gift to a stranger is to take place in case of the death without issue of the tenant for life. I cannot rely on the dictum of Sir Thomas Plumer, but there was good ground in *Greene* v. *Ward* for sustaining the claim of the children as against those who claimed in opposition to them. I think there is a distinction between a gift to a party, with restriction of the gift for the purpose of protection, and a restriction of the gift itself. I had to consider this a few days ago in a case of *Gomperts* v. *Gomperts* (3). *Greene* v. *Ward* has never been lost sight of. I am of opinion that that construction cannot be supported, and I cannot conceive that the plaintiff has any claim to the legacy. I may speculate what the testator would have done if he could have contemplated these events; but the circumstances which have happened are not provided for by the will. The appeal must be dismissed, without costs. The appellant is not required to pay costs, and the deposit will be returned, as a matter of course.

(2) 2 Myl. & K. 446; s. c. 1 Law J. Rep. (N.S.) Chanc. 183.

(3) See the preceding case.

L.C.
Nov. 2, 3, 4. } IN RE PENDER.

Solicitor—Taxation of Bills—Signature—Stat. 6 & 7 Vict. c. 73.—Construction—Order of Course—Special Order—Papers.

Under the 37th section of the act 6 & 7 Vict. c. 73, a bill of costs which has been delivered, though not signed by the solicitor, or inclosed in a letter signed by him referring to it, may be referred by the Court for taxation.

A client obtained an order of course, to tax a solicitor's bill of costs which had been delivered to him, and therein the solicitor was directed to deliver up all papers, &c. belonging to the client on payment of the amount to be found due. The solicitor had other papers, which related to business transacted for a deceased person, who was now represented by the petitioner, and in respect of which he claimed to have a lien for other costs; but the Court, under the circumstances adduced, declined to discharge the order for irregularity.

The particulars of this case, and the judgment of the Master of the Rolls, will be found reported in 14 *Law J. Rep.* (N.S.) Chanc. 277, and 8 *Beav.* 299.

The solicitors appealed from that decision, and the case was argued before Lord Lyndhurst in November 1845, but his Lordship resigned the Great Seal without pronouncing judgment in this case, and it was re-argued before Lord Cottenham.

The circumstances of the case were, shortly, as follows:—The appellants had acted as solicitors for Mr. Glasson, who died in March 1843. After his death, and in July 1843, they made out four bills of costs in respect of business done by them for him. In November 1844 they sent three other bills of costs for business done by them for his administratrix; none of these bills were signed, or sent in a letter in which they were referred

to. On the 10th of February 1845, the administratrix obtained the common order at the Rolls for the taxation of the three bills for business done for her, and the solicitors were to deliver up all deeds, &c. in their possession belonging to her. On the 22nd of February 1845 she presented a petition for the taxation of the four bills sent in for business done for Mr. Glasson, and for the delivery up of all papers, &c. belonging to her. She had previously obtained an order of course, for the taxation of the bills sent to her as administratrix, and the delivery to her of all papers belonging to her in that character; but that order, being found to be irregular, had been discharged by her on the 20th of February 1845. The solicitors moved, that the order of the 10th of February 1845 might be discharged for irregularity, and the motion and petition had come on together.

The Master of the Rolls refused the motion and granted the petition, ordering the bills to be taxed.

Mr. J. Parker and *Mr. W. M. James*, for the appeal, relied upon the circumstance that the bills had not been signed by the solicitors, or inclosed in a letter signed by them and referring to the bills: and they contended, that if a client could obtain a taxation of an unsigned bill, the solicitors ought to have the same privilege; but it could not be supposed that the Court would allow a solicitor to obtain taxation of a bill which he had never signed. That the order was wrong in requiring the solicitors to deliver up all the deeds, &c. in their possession which belonged to the petitioner; and that it ought to have been confined to such deeds, &c. as the bill of costs related to.

Mr. Roupell and *Mr. Goodeve*, for the executrix, contended, that the signature of a solicitor to a bill of costs was only necessary when he proposed to bring an action for the amount due to him. The signature was never required before the statute of 2 Geo. 2. c. 23. The expression in the 41st section of 6 & 7 Vict. c. 73, and other sections, after the 37th section, was "such bill," and the expression must be traced up to the 37th section, in which it was a bill delivered and signed, whereas in many of the sections it was impossible that the words "such bill" could have that meaning. The Master of the Rolls had incidentally expressed his opinion on this point in *In re Downes* (1). In *Doe* d. *Bryan* v. *Bancks* (2), a party was allowed to avai himself of a lease, although it contained proviso that in certain events which ha happened he had the option of avoiding th lease: and on the same principle a clien might have an unsigned bill of cost taxed, although the want of the signatur might be a good defence to an action at lav by the solicitor.

Mr. J. Parker, in reply.

The following authorities were referred to

Doe d. *Palmer* v. *Roe*, 4 Dowl. P.C. 95
Gerrard v. *Arnold*, 6 Ibid. 336.
Vincent v. *Slaymaker*, 12 East, 372.
Peters v. *Sheehan*, 10 Mee. & Wels. 213 s.c. 12 Law J. Rep. (N.S.) Exch. 177.
In re Gaitskell, 1 Phil. 576; s. c 14 Law J. Rep. (N.S.) Chanc. 450.
Biggs v. *Maxwell*, 3 Dowl. P.C. 497.
Ex parte Bowles's Trustees, 1 Bing. N.C 632; s. c. 4 Law J. Rep. (N.S.) C.P 203.
Clutterbuck v. *Combes*, 5 B. & Ad. 400
1 *Turner and Venables' Chancery Prac* 843.
1 *Tidd's Practice*, 325.
Seton on Decrees, 333.
Statute 3 *Jac.* 1. c. 7.

Nov. 4. — The Lord Chancellor.— have looked through the act in this case, an the authorities which have been referred to and, except one, the authorities certainl are very little applicable to the case indeed I therefore consider it upon the constructio of the act of parliament; there being tw constructions put upon the act of parlia ment, one that the provision that the bil shall be signed applies to all the state of circumstances in the 37th section i which the bill is referred to; the othe construction being that the provision a to the signature of the bill is to be con sidered as a distinct provision, and tha when the bill is mentioned again it mean the bill, without any reference to any pro vision that the bill shall be signed. Th question is, whether, when a solicitor deliver a bill not signed, nor accompanied by letter signed referring to the bill, that bil

(1) 5 Beav. 425; s. c. 13 Law J. Rep. (N.S Chanc. 159.
(2) 4 B. & Ald. 401.

is or is not taxable on the application of the party chargeable with the payment of that bill.

Now, in the first place, upon the construction of the act of parliament there cannot be much doubt. In this, as in all other cases, a course of practice founded on a particular construction of the act, would go a great way to induce any Court to come to a conclusion consistently with that practice. Certainly, if that practice had been recognized by any judicial decision, it would, of course, have had a great deal of weight. Now, a case has been referred to before the Master of the Rolls, in 5 *Beav.* in which, undoubtedly, he appears to have put the same construction on the act as he has done in the present case. In that case the Master of the Rolls states in his judgment, that he had information from the officer at the Rolls whose duty it is, and who, in fact, does draw up by far the greater part of the orders applicable to these cases, that no distinction has been made, on applications to tax a bill on behalf of a party chargeable with the payment, as to whether that bill has been signed or not, or accompanied by a letter signed, also referring to the bill, according to the provisions of the act of parliament. I have also to consider what the result would be of the one construction or the other; and I have in vain endeavoured to ascertain from my own consideration on the arguments that have been addressed at the bar, what possible benefit could arise—what benefit the legislature could have intended to either party, from providing that no bill should be taxed on the part of the client unless it was signed. There are very obvious reasons why, as a protection to the client against the solicitor, the solicitor should be required, before he proceeds at law, to sign the bill, that there may no longer be any doubt or ambiguity as to the extent of his demand: in short, that the bill so signed may be positive and distinct evidence of what his demand is. It is also to be observed, that the solicitor is under this penalty, by the provisions of the act—that if he delivers a bill on which one-sixth is taken off by taxation, he incurs the penalty of paying the expenses of that taxation. It is very material, therefore, that it should be open to him to dispute the demand which he has made, before he is made liable to the penalty which the act has fixed. On the other hand, as the Master of the Rolls observes, it would be open to the greatest possible improper practice, if a solicitor, after having delivered a bill and endeavoured by so delivering a bill to obtain more than he was entitled to, should be at liberty to withdraw from that demand, and protect himself against the penalty imposed by the act, by saying "that bill was never signed: now I will deliver a bill signed, which I can maintain before the taxing officer, having tried the experiment of making you pay more than you ought." It is obvious that might lead to great malpractice; and the reason is, therefore, very obvious why the Court should require that a bill should be signed as a protection to the client against the solicitor. But all these reasons are reasons why the solicitor should not have a right to say that bill is to go for nothing against himself, because he delivered it not signed.

Now, such being the state of the facts and authorities so far as they are applicable to this case, and such being the mischief and the remedy, one way or the other, with regard to which the act was passed, I come to the consideration of the particular language of the statute; and undoubtedly, if the language were distinct, and if there were no ambiguity in the terms of it, no practice or decision could justify me in departing from the provisions of the act of parliament; I should be bound to restore the practice to what I found in the act. If, on the other hand, the terms are ambiguous, the considerations I have adverted to are very proper to be taken into consideration before I come to that conclusion. But I cannot say, on looking at the act, I do find it to be ambiguous: it is perfectly distinct. I do not mean to say what ingenious arguments may be founded upon each side on the constructions contended for. I have no hesitation in saying, that I think the construction which the Master of the Rolls has put on this statute is the correct construction, and is quite sufficient to bear out the judgment he has pronounced. Where we find in this act the term "such bill," the question is, whether those words "such bill" mean the bill containing the demand, or whether it means such bill containing the demand and signed or accompanied by a

letter signed referring to the bill. The statute provides, in the 37th section, "that no attorney shall commence or maintain any action for the recovery of any fees for business done by such attorney until the expiration of a month after such attorney shall have delivered to the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in, or accompanied by, a letter subscribed in like manner referring to such bill." It provides, therefore, two modes of doing it. The attorney may either subscribe his name to the bill itself, or may accompany it with a letter, which letter may be signed, and which, so signed, must refer to the bill. It is therefore obvious, on this enactment, that it includes a bill not signed, provided it be accompanied by a letter,—but a bill which on the face of it is a bill not signed. Then it proceeds,—"and upon the application of the party chargeable by such bill within such month, it shall be lawful for the Judges, and they are hereby required to refer such bill, and the demand of such attorney or solicitor, thereupon to be taxed and settled by the proper officer." Here, then, is a provision referring to a bill signed, and to a bill not signed, if it be accompanied by a letter signed; and then the provision mentions "such bill"—What is such bill? Why, it cannot be confined to a bill signed, because if that be the construction of "such bill" in this part of the sentence, it would exclude the bill not signed, though accompanied by a letter. Where there are two ways of delivering a bill prescribed, one of which will contain the signature of the attorney, the other of which will not contain the signature of the attorney on the face of the bill itself, and a subsequent clause providing for such bill, it seems to me impossible to adopt the construction that "such bill" means a bill signed on the face of it; because that would exclude one mode of delivering a bill which evidently the act intended to include. Now, there are many other provisions on which similar observations arise. This arises on the first part of the clause which follows the description of the bill, and the argument on the other parts of it do not carry further the argument. It is quite sufficient for my purpose to see that the very first time we have the expression "such bill,"—it must be intended to include a bill delivered and not signed on the face of it, as well as a bill delivered and signed; and if that be the right construction of the statute, it is the construction which the Master of the Rolls has adopted, the construction which I find put upon it virtually in another case, and which is consistent with the practice which has been from all time established. I think it is quite sufficiently clear that the Master of the Rolls has put a right construction upon it.

Now, this observation applies only to three of the bills. There are seven in all: because, with regard to the four which relate to the property, and the business done for the testator in this case, which were delivered to the person after the death, who did not afterwards obtain administration, and were handed over by that person to the administratrix after the administration granted, that evidently would not fall within this question, because the taxation of those bills having arisen on an application for the papers belonging to the testator, it would belong to the ordinary jurisdiction of the Court, and would not necessarily be a taxation under the provisions of this act. The case of *Peters* v. *Sheehan* ascertains that beyond all doubt. The observations of the learned Judges in that case all proceeded on this, that independently of the statute, whatever doubt there might be of the jurisdiction of the Court, where it is accompanied by an application against the attorney, as one of the officers of the court, to restore papers which he got into his possession as attorney, and the taxation of the bill is incident to the delivery of the papers, there the jurisdiction of the Court is independent of the statute. That also disposes of the question argued at the bar as to the delivery of the bill, because this is an application by a party representing the testator for the delivery of papers, and the taxation

is only incidental to that, and not dependent on the provisions of the act. But then there are three other bills, which belong to business done for the administratrix herself, and there is a simple order for taxation, except that a month has elapsed, but that is undoubtedly under the provisions of the statute. It has been said, because a month had elapsed the provisions of the act had not been followed. I think I disposed of that during the argument. It appears to me to be perfectly clear that the only difference is, that during the month there is no discretion whatever in the Court; and the Court, without anything beyond that which is necessary to carry the order into effect, is required, by the terms of the act, to direct the taxation; but after the month there comes this provision, — "and in case no such application shall be made within such month, then it shall be lawful for such reference to be made, either upon the application of the attorney or solicitor whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the Court shall think proper." After the expiration of the month, therefore, it is not under the peremptory provisions of the statute. There is then a duty, undoubtedly, in the Court to do it; but there is a power also in the Court to impose such regulations and restrictions as the Court may think fit, for the purpose of doing justice between the parties. It is not that there is to be a special hearing, or a special case made; but that the Court is to adapt its practice to what appears to be the proper mode of doing justice between the parties, and that evidently has been the practice adopted at the Rolls; and the regulations are laid down by the Court, under the authority given by this section, of regulating the form and mode of taxation after the expiration of the month, which entirely disposes of one of the most pressing arguments at the bar—that if this construction were carried out, you cannot treat this rule as applicable to the client without also treating it as applicable to the attorney; and it is said, after the expiration of a month, the attorney is at once relieved from all the requisitions of the statute, because, then, it may be referred though not taxed. That may be so if the Court has no power to intervene; but it is quite clear the Court has the power to intervene and say "No,—you, the attorney whose duty it was to sign the bill,—you shall not be permitted after the expiration of a month to do that which is equivalent to an action, without delivering a taxed bill: you cannot bring an action by the express provisions of the statute, without having delivered a taxed bill; nor can you make use of the jurisdiction of the Court, in order to get that which is equivalent to an action, namely, payment of the amount, unless you have complied with the provisions of the statute and delivered a bill signed:" it is quite within the province of the Court to impose that restriction; but there is no such provision as applicable to the client. The client has the bill delivered; and if there is a doubt raised, all he has to do is to prove that that was the bill he received from the attorney; and that being done, his interest is involved in the rule of having the bill taxed without requiring him to prove that the party to whom he is opposed has duly signed the bill; and accordingly so the practice is: there is no question asked, and no difficulty made on the application of the client. If the attorney asks for a reference, the Court looks to the provisions of the act, and requires him to comply with the provisions and to sign the bill.

One other point remains, which I have also considered, and which, if it is open to any possible difficulty on the part of the solicitors, would be entitled to consideration; but no such case is made. They say, that these orders are bad, because the order upon the petition directs the solicitors, upon payment of the bill, to deliver up all papers belonging to the party seeking the taxation. Now, some papers related to the testator and some related to the party herself; and on looking at the orders as they stand, I cannot conceive any possible difficulty there can be in the solicitors complying with one or the other of the orders. There is the first bill, and there is the bill relating to the affairs of the testator, and the two orders together embrace all the money transactions depending between the party, asking for the taxation, and the solicitors whose bills they are; and the course is, they should deliver up all papers, and all those bills being paid, all those papers would be de-

livered up. It is said they do not specify, because there may be some which, though connected with the suit and the business of the testator, still have become the personal debt of the representative, because there has been a supplemental bill filed. I think that is the only part of the case stated, and the only part of the business done on which by possibility any ambiguity can be raised. If there be any difficulty when the solicitors come to perform the order, if they are asked to deliver any paper in respect of which the costs have not been paid, it is quite open to them to ask to be relieved from such order. I can find no ambiguity in the order, which, according to the facts brought before me, is at all likely to raise such a difficulty; and, therefore, I think no weight is to be given to such an objection.

I think, therefore, all the objections to the order of the Master of the Rolls have failed, and I must dismiss this application with costs. I must say, as to a great part of it, they are objections which I am sorry to see made by parties who have the opportunity of receiving their bill, provided the amount be ascertained by the proper officer of the Court, and who are precluded by the act of parliament, and by the practice of the Court from receiving more than they are entitled to. Some of these objections, I must say with the Master of the Rolls, are very ludicrous objections, and which I am sorry to see brought forward. I think they all entirely fail, and that the appeal from the Master of the Rolls must be dismissed, with costs.

WIGRAM, V.C. Nov. 19, 20, 21. { ROBERTSON *v.* SOUTHGATE. HARMAN *v.* SOUTHGATE.

Attachment — Answer — Irregularity — Bankruptcy of Plaintiff and Defendant— Supplemental Bill.

Where the plaintiff and defendant, in the original suit, both become bankrupt before answer, and a supplemental bill was filed by the assignees of the plaintiff (who are also assignees of the defendant), stating the fact of the bankruptcy, it is irregular on the part of the assignees to proceed by attachment in the name of the bankrupt plaintiff, to enforce from the bankrupt defendant an answer to the original bill.

The notice of motion to discharge the attachment should be headed in both causes.

Previously to December 1842, W. M. Robertson and Henry Southgate carried on business in partnership. On the 6th of December 1842, W. M. Robertson filed his bill against H. Southgate, and on the 14th of December 1843, before the answer was put in, a fiat in bankruptcy was issued against H. Southgate, under which he was duly declared a bankrupt. On the 4th of January 1844, a joint fiat issued against the plaintiff and defendant, under which they both were declared bankrupt; and on the 23rd of January, Harman and another were chosen as the creditors' assignees, and Turquand was the official assignee. On the 15th of February the two fiats were consolidated, and on the 17th of April H. Southgate obtained his certificate. On the 2nd of March 1846, a supplemental bill was filed, in which the creditors' assignees were plaintiffs, and H. Southgate and Turquand, the official assignee, were defendants; and it stated the bankruptcy of the plaintiff and defendant in the original suit, and prayed leave to prosecute the suit against the defendant in the same manner as the bankrupt plaintiff might have done. In June 1846 an application was made on behalf of the bankrupt plaintiff to H. Southgate that he should put in his answer to the original bill; and on the 6th of November following the defendant Southgate was attached at the suit of Robertson for not answering the original bill. A motion was now made in the original cause on the part of the defendant Southgate, that the attachment might be discharged for irregularity, or that the proceedings might be stayed against him.

Mr. Romilly and *Mr. Torriano*, for the motion.

Mr. K. Parker and *Mr. Greene*, contrà.

Nov. 21.—WIGRAM, V.C.—This was an application by the defendant to discharge an attachment, issued against him for want of an answer, or, in the alternative, to stay proceedings against him. It appeared that the defendant, who made the application, became bankrupt before putting in his answer. When that happens, the plaintiff

may, without being irregular, call for an answer, and thereby put the defendant to insist upon his bankruptcy by plea or answer. But if, in that case, the plaintiff, instead of proceeding, files a supplemental bill against the assignees of the bankrupt, it is not regular, at least not proper, after that, to sue out process of contempt against the bankrupt for want of his answer, that is, not after putting upon the record the fact of the bankruptcy. Nor is that proceeding necessary, for the clerk of the records and writs, as a matter of course, issues the usual certificate for setting down the cause without answer. So where the plaintiff and defendant become bankrupts, and different assignees are appointed, and a bill is filed by the plaintiff's assignees against the defendant's assignees to have the benefit of the suit. In the case before me the same persons are assignees both of the bankrupt plaintiff and of the bankrupt defendant; and, before the supplemental bill was filed, the proceedings to compel an answer might have been taken in the name of the plaintiff; but after that bill was filed, the assignees cannot properly proceed against a party whose rights and liabilities they say by their supplemental bill are transferred to them. But though it might not be proper for a party who puts upon the record the fact of the bankruptcy to take proceedings in the name of the alleged bankrupt, as if no bankruptcy had happened, it does not therefore decide that the plaintiff, the alleged bankrupt, may not proceed in his own name. Therefore I thought it right to inquire whether in the present case the attachment, which issued in the name of the bankrupt plaintiff in the original cause, was the act of the plaintiff, insisting upon his own right to proceed, and disputing the right of the assignees to proceed by supplemental bill, or if the proceeding was that of the assignees. It was properly admitted that it was, in truth, the act of the assignees. The solicitor of the plaintiff is now the solicitor of the assignees. The two suits are one. The attachment was issued upon the supposition that it was necessary to obtain from the defendant an answer in the original suit to enable the assignees to prosecute the suit for the plaintiff, as it was said the clerks of records and writs would not grant the usual certificate without it. It is admitted that they would grant the usual certificate in the case I have first suggested. I cannot myself discover any distinction in substance between the two cases. The proceeding, in a case like the present, is no more behind the back of the alleged bankrupt than in the case I have suggested. But I think—without saying the proceeding is irregular, (on the face of it it does not appear to be so,)—I think it is not proper for the assignees to take the steps they have taken. But I think the party making the motion should have made his motion in both the causes, the original and supplemental cause. It was said he could not do that, because he is not a party to the supplemental suit. The case of the plaintiffs in the supplemental suit, and that of the defendant in this motion, are one case; and the plaintiffs in the supplemental suit are represented by the defendant as to rights and liabilities. It is the common case of a supplemental bill, filed to make the case perfect, and the party is entitled to make his motion in both causes. I think the right course is not to discharge the order for irregularity, but to stay the proceedings; but the defendant must amend his notice of motion, before I can do it regularly. Let the motion stand over till next seal to amend the notice of motion and to serve the plaintiffs with a correct copy of the notice of motion. I give them the leave to amend their notice of motion, for the assignees may afterwards say that they have not been served at all in point of form. I go upon this ground, that, after the plaintiffs have put upon the record the fact of the bankruptcy, it cannot be proper to go on in the suit as if there were no bankruptcy.

M.R. Nov. 5, 24. } CARPMAEL *v.* POWIS.

Annuity—Deed, Rectification and Cancellation—Mistake in Computation.

A treaty was, in 1839, *entered into with the plaintiff for the purchase of an annuity for the life of P. In an interview between P.'s agent and the plaintiff it was agreed, subject to P.'s approval, that the plaintiff should give* 1*l. per cent. more on the*

purchase-money (1,800l.) than government would grant. On the same day the agent saw the defendant's solicitor, and stated to him in the course of conversation on the subject of the intended annuity, that he would obtain from a friend of his in the National Debt Office a statement as to the amount of the annuity which would be obtained from government for 1,800l. on P.'s life. That statement was obtained, and therewith the plaintiff expressed his satisfaction. Four years afterwards, the plaintiff discovered that the amount of the annuity granted by him was much too large in amount; and that the computation of the annuity had been made on a male instead of a female life. The principle on which the amount of the annuity had been calculated was communicated to P. previously to the completion of the grant of the annuity to her:—Held, that the Court could not rectify the deed granting the annuity; but on the plaintiff's waiving any account of the payments made in respect of the annuity previously to the filing of the bill to set aside the deed, the Court ordered the deed to be delivered up to the plaintiff to be cancelled, and the proper accounts to be taken of principal and interest due to the defendant, P. and the balance thereof, after deducting the costs of the suit, to be paid to P.

The bill was filed by W. Carpmael against Letitia Powis and Thomas Powis, and Michael Smith, seeking that a deed of grant of an annuity of 176l. 10s., during the life of L. Powis, dated the 8th of January 1840, might be rectified, or that the same might be set aside and delivered up to be cancelled, on the ground that the annuity had been computed in error. Early in the month of October 1839, the defendant, L. Powis, was desirous of purchasing an annuity for her life, for the sum of 1,800l., which was the purchase-money of certain freehold houses belonging to her, and the plaintiff was desirous of granting the same. The defendant, T. Powis, at the request of L. Powis, who was his sister, called upon the plaintiff on the 5th of that month, when a conversation took place between them on the subject of the grant of the annuity, but nothing was definitely settled on that occasion relative thereto. After the conversation, and on the same day, T. Powis saw Mr. Venning, the solicitor of L. Powis, and made some communications to him on the subject of the annuity, who suggested to T. Powis that an annuity to be granted by a private individual ought to be of larger amount than one to be granted by government, because the security of the former was not so good as that of the latter. Subsequently, and on the same day, T. Powis again saw the plaintiff, and conversed with him on the subject of the annuity, and requested that the amount proposed to be granted by the plaintiff should exceed what government would give, upon which it was agreed and arranged between the plaintiff and T. Powis, subject to Miss Powis's approval, that the plaintiff should give 18l. more than the amount of a government annuity, in consideration of the sum of 1,800l. L. Powis was then in her 58th year. T. Powis, on the same day, saw Mr. Venning, and informed him that he would obtain from a friend of his in the National Debt Office a statement as to the amount of the annuity which would be obtained from government for 1,800l. on L. Powis's life; and accordingly on that day T. Powis did obtain such statement from his friend, and the same was as follows:—"At the present price of 3l. per cents. namely, 90⅔l., 1,800l. money would yield an annuity of 158l. 9s. 6d., on the life of a female aged fifty-eight. 5th October 1839." The plaintiff expressed himself satisfied with the computation of the annuity. The amount of the annuity, which was to be granted by the plaintiff to L. Powis, and the principle upon which that amount had been calculated, were communicated to L. Powis, on the 6th of October, by T. Powis, and the above statement, in writing was, at the same time, shewn to her by T. Powis. A meeting was then appointed for Monday the 7th of October, at the plaintiff's office, when the agreement in writing was completed for the grant to L. Powis of an annuity of 176l. 10s., consisting of the sum of 176l. 9s. 6d., and 6d. to make even money, by four quarterly payments, in consideration of 1,800l., the same to be charged on certain freehold houses therein described; the first payment to be made on the 25th of December 1839. The annuity was secured by the deed of the 8th of January 1840, and was regularly paid until the latter end of

the year 1833. On the 20th of January 1844, an article appeared in the *Times* newspaper, which was read by the plaintiff, and from the statements contained in it, the plaintiff felt satisfied that he had been misled with reference to the annuity granted by him to L. Powis, and, as he believed, through some mistake in the calculation of the annuity, as for a male instead of a female life, and that the annuity granted was of too large amount by 20*l.* and upwards. Thereupon a correspondence ensued between the plaintiff and T. Powis, the result of which was a refusal on the part of the solicitors of L. Powis to make any reduction for the future, in the amount of the annuity. The above facts appeared on the evidence of T. Powis, who was examined both on the part of the plaintiff and defendant L. Powis. L. Powis, by her answer, stated, that she communicated to T. Powis her willingness to purchase an annuity from the plaintiff, if she could procure an annuity of sufficient amount, and on sufficient security, and that she gave no further or other instructions to T. Powis, with respect to the said intended purchase. She also stated, that T. Powis did not inform her of the mode in which the amount of the annuity was calculated, nor of any of the particulars of the treaty with the plaintiff, with reference to the offer, but only of the proposed amount of the annuity, in order to know if she would agree to purchase the same, and that she was wholly ignorant of such particulars and mode of calculation. The fact of the annuity having been wrongly calculated was proved.

The decision of the Court upon a demurrer put in to certain interrogatories by the defendant's solicitor, will be found reported in 15 *Law J. Rep.* (N.S.) Chanc. 275.

Mr. Turner and *Mr. Stevens*, for the plaintiff, contended, that as there was a clear error in the calculation of the annuity, the Court would either rectify the deed granting the same, or set it aside altogether; that the transaction could not stand, the plaintiff being wholly ignorant of the mistake at the date of the agreement to grant the annuity; and that L. Powis must account for the payments made to her by the plaintiff, which would be deducted from the amount of principal and interest to be paid to her by the plaintiff.

Baker v. *Payne*, 1 Ves. sen. 457.
Ramsbottom v. *Gosden*, 1 Ves. & Bea. 165.
Ball v. *Storie*, 1 Sim. & Stu. 210; s. c. 1 Law J. Rep. Chanc. 214.
Clapham v. *Shillito*, 7 Beav. 146.
Colyer v. *Clay*, Ibid. 188.
Mitford on Pleading, 188.

Mr. Kindersley and *Mr. Malins*, for the defendant, L. Powis, contended that the case was not one of mutual mistake; and that, therefore, the Court would not interfere, especially where the hardship would be so great on the defendant, and where the statement of the plaintiff's only material witness was directly opposed by the defendant's statement in her answer; that T. Powis had no authority to bind his sister, the authority to him being only of a very limited character; that the case was not one of misrepresentation by one side, but by a common agent of all parties, and the plaintiff was competent to discover, and with reasonable diligence might have discovered, the mistake that was made; that the result of the case was in reality a sale to the plaintiff by the defendant, L. Powis, of her houses for an annuity of 176*l.* 10*s.*; that the contract was not executory in its nature, and it was impossible to restore the parties to their original situations.

Stangroom v. *Marquis Townshend*, 6 Ves. 328.
1 *Sugd. Vend. & Purch.* 259.
Beaumont v. *Bramley*, Turn. & Russ. 52.
Lord Irnham v. *Child*, 1 Bro. C.C. 92.

Mr. Parker appeared for the defendants, T. Powis and M. Smith, trustees, appointed for the purpose of securing payment of the annuity.

Mr. Turner, in reply.

The MASTER OF THE ROLLS observed that it was difficult to say that the mistake must be corrected, and there was also a difficulty in saying that the transaction should be set aside; it might be thought that, by means of compensation, justice might be done to both parties; but that was not the case as to one of the parties, who looked on the annuity as income, and the

mere allowance to her of interest would by no means make the parties equal.

Mr. Turner thereupon stated to the Court that his client had instructed him to say that he was willing to waive the account of the arrears of the annuity, up to the time of the filing of the bill (in June 1844) upon which—

The MASTER OF THE ROLLS observed, that such an offer removed some of the difficulty of the case.

Nov. 24.—The MASTER OF THE ROLLS, on this day, after stating the facts of the case, observed, that it was insisted, on the part of the plaintiff, that he by mistake had granted too large an annuity, and that the defendant, the purchaser, had improperly refused to relieve him therefrom, on application being made to her; the defence was, that Miss Powis intended to purchase an annuity of 176*l.* 10*s.*, and would not, if she had been applied to for that purpose, have consented to take an annuity of less amount in consideration of the 1,800*l.* It was possible the defendant, Miss Powis, neglected the mode of calculating the annuity, and intended to have an annuity of 176*l.* 10*s.* however the same might be calculated: the plaintiff, however, intended only to grant an annuity being 18*l.* more in amount than would have been granted by the government offices for the same consideration. I must, however, conclude, from the evidence adduced in the cause, that Mr. Powis told the defendant, Miss Powis, of the mode in which the annuity had been agreed to be calculated. A decree to rectify the annuity deed could not be made; and the only question was, whether the grant of the annuity was to be declared void. It was evident that the plaintiff relied on the information obtained by T. Powis, and had no reason at the time to suppose that the annuity had been erroneously or improperly calculated. His Lordship did not think there was any fraud practised during the negotiations, on the part of any individual; but there was such a mistake made that he did not think the plaintiff ought to be held to the agreement. An account must accordingly be taken from the time of the filing the bill of principal and interest monies due to the defendant, and, after deducting therefrom the amount of costs payable to the plaintiff in respect of the present suit, the annuity deed must be delivered up to the plaintiff to be cancelled.

V.C.
May 2, and several successive days; Judgment, Oct. 29.

THE ATTORNEY GENERAL *v.* THE EARL OF DEVON.

Charity—Grammar School—Trustee—System of Education.

Peter Blundell, by his will, dated in June 1599, directed his executors to lay out 2,400l. in building a school at Tiverton; that in the said school should not be taught above 150 scholars at any one time, and these to be of children born, or for the most part before their age of six years brought up, in the town of Tiverton, and if the said number be not filled up, that the want should be supplied with the children of foreigners, to be admitted with the assent of such ten householders as for the time being should be most in the subsidy books of the Queen, and no boy should continue in the school above the age of eighteen, or be admitted under the age of six years, and none under a grammar scholar. The testator then gave directions as to the payment of a schoolmaster and usher, and desired that they would hold themselves satisfied and content with the recompence he had provided for their travail, without seeking or exacting any more, either of parents or children, his meaning being that it should be for ever a free school, and not a school of exaction. The testator gave other sums for the establishment of scholarships at the universities.

Upon an information filed against the trustees of this charity for a scheme for the general regulation and management of the funds, and for an alteration in the system of education,—it was referred to the Master to inquire into and state the annual income of the charity; and it was declared that the schoolmasters ought not to receive payments for the scholars or take boarders; that none but boys educated as free scholars were eligible to the scholarships and exhibitions; and that the testator, by the term "foreigners" meant any children not born or brought up in the parish. The Master was

to inquire what salaries ought, under such circumstances, to be paid to the schoolmasters, and if their number ought to be increased; and whether it would be desirable to apply part of the funds in providing instruction in matters of science and literature, and in modern languages, and to declare what new qualification should be prescribed for the ten householders in lieu of subsidy books as directed by the will.

This was an information filed on the 31st of March 1840, by the Attorney General, at the relation of John Heathcote, Esq., M.P. and W. Hole, Esq., two of the principal inhabitants of the town of Tiverton, against the trustees and masters of the Grammar School at Tiverton, which was originally founded by Peter Blundell, who was a native of Tiverton. The information stated, that P. Blundell made his will on the 9th of June 1599, and thereby gave a great number of legacies to his friends and acquaintances, his servants and tradespeople, and large sums of money to different companies belonging to the city of London, and to various charities. The will then contained a direction to his executors to purchase a fit and convenient piece of ground, and to erect thereon a school-house, for teaching boys, in length 100 feet and in breadth twenty-four feet, and a hall, buttery and kitchen, all of convenient space and bigness, with fit and convenient rooms over the same, all the windows well and strongly glassed, and barred with iron bars, and well covered with planks of oak, to be strongly wainscoted, and in such manner to be framed, placed and devised as should be thought most convenient. The hall to be planked or paved, and also wainscoted round, and in the hall and chamber over the same one or more chimney, and in the kitchen one fair great chimney, with an oven, and a chamber over the kitchen, with a chimney therein; and that there should be adjoining to the school-house a convenient garden and a wood-yard and other outbuildings to be inclosed round about with a strong wall; and that the executors should expend the sum of 2,400*l.*, at least, in the building the premises. And the testator directed, that in and about the buildings the advice and directions of his right dear and honourable friend, Sir John Popham, Knight, Chief Justice of England, should be taken. The testator then directed, that in the said schools should not be taught above the number of 150 scholars at one time, and those from time to time to be of children born, or for the most part before their age of six years brought up, in the town or parish of Tiverton aforesaid; and if the same number be not so filled up, his will was, that the want should be supplied with the children of foreigners, and those foreigners only to be received and admitted from time to time for ever, with the assent and allowance of such ten householders of the said town of Tiverton aforesaid, as for the time being should be most in the subsidy books of the Queen, for ever; and his desire was, that they from time to time should make choice of the children of such foreigners as were of honest reputation and feared God, without regarding the rich above or more than the poor; and that no scholar should be or continue in the said school as a scholar above the age of eighteen years or under the age of six years, and none under a grammar scholar; and the schoolmaster, who should be appointed in manner directed by the will, should for the time being have the use of the rooms and buildings aforesaid, and also the usher to be appointed in like manner should have in the said building one chamber to himself only, and the schoolmaster for the time being should have yearly, for ever, 50*l.* to be paid quarterly, and the usher 20 marks, to be paid in like manner quarterly. And his desire and will was, that they should be satisfied and content with that recompense for their trouble, without seeking or exacting any more either of parents or children, which procureth favour to givers and the contrary to such as do not or cannot give; for the testator's meaning was, that it should be for ever a free school and not a school of exaction. And for the better establishing, maintenance, and continuance of the free grammar-school and schooling for ever, he gave and devised all his lands, tenements, and hereditaments, in the county of Devon, to twenty-seven persons therein named, and their heirs and assigns for ever, who, he trusted, would accept the same as feoffees, he having chosen them to bear trust and confidence in the premises. The testator

then directed, that the sum of 20*l.* should be expended yearly in apprenticing four poor boys of the town to serve in husbandry; and he then gave directions for continuing the feoffees to the number of twenty-five, at all times thereafter; and he also directed his executors to disburse the sum of 2,000*l.* in establishing six scholars to be students in the University of Oxford or Cambridge, and in purchasing lands and tenements for their maintenance for ever, in such manner as the said Lord Chief Justice should think meet. The testator died in April 1601, and within four years after his death the school-houses were built according to the directions contained in the testator's will.

The information stated, that this institution had received several important accessions since the death of the testator. In 1678, John Ham, of Uptonman, gave 300*l.* for the maintenance of a fellow and scholar, to be chosen from Tiverton School. In 1783, Benjamin Gilberd, of Exeter, grocer, gave an annuity of 60*l.* for the benefit of the school. In 1715, John Newte gave a small estate yielding 50*l.* a year, and in 1839, Richard Down gave 700*l.* consols, the dividends to be applied for the benefit of the school. These various donations had been applied in the founding of scholarships and exhibitions, which amounted to the number of five at 30*l.* per annum each. The property at present vested in the hands of the feoffees produced 1,127*l.* 7*s.* 2*d.* per annum.

In 1734 an information was filed against the feoffees of the school, for the purpose of having the direction of the Court as to the choice of the master, usher and scholars; and, in February 1735, it came on to be heard before the Master of the Rolls, who decided that there ought to be a majority of the trustees present at the election of the master, usher, and scholars, and that the election ought to be made by such majority; and it was referred to the Master to declare, amongst other things, the best way of disposing of the surplus income of the school; and the parties were at liberty to lay a scheme for that purpose before him. The Master, by his report, recommended that the surplus income be applied and disposed of in one or more exhibition or exhibitions at large, to any college, in either of the universities, as the trustees might think fit. On the 1st of August 1740 this plan was approved of, subject to the further order of the Court, and the parties were to be at liberty to apply from time to time, but no further application was ever made in that suit.

In 1839 a petition was presented by certain of the present feoffees, praying that it might be referred to the Master to approve of a proper scheme for the application of the balance which was in the treasurer's hands and of the surplus income of the charity property, and also a proper scheme for regulating the admission of the children of foreigners into the school. The petition was presented under the act of 52 Geo. 3. c. 101, and, on the 4th of June 1839, his Honour ordered that the references to the Master prayed by the petition should be made. In 1840 another petition was presented under the same act of Geo. 3, by Dr. Kettle and several other inhabitants of Tiverton, praying that it might be declared that the whole surplus income arising from the charity property ought to be applied for the benefit of the school, and that such benefit ought to be confined to free scholars only; that the master and under-master ought not to receive any payment from the boys educated at the school, and that they ought not to be allowed to take boarders, or at least that none but free scholars ought to be eligible to the scholarships and exhibitions; that the Master might be directed to settle a scheme for the application of the surplus income, and to inquire whether it would not be proper to apply some part of such income to provide instruction in the said school, in other matters of science and literature, besides Latin and Greek; that if he was of opinion that it was proper so to apply any part of the surplus income, then that he might include the same in the said scheme; and that it might be declared that the feoffees ought to reside in the town of Tiverton, or its immediate neighbourhood. The petition came on for hearing before the Vice Chancellor, the 14th of February 1840, and he thereupon ordered that the petitioners should be at liberty to attend the Master under the order of reference made upon the first petition, and to carry in a scheme under the said order; but his Honour dismissed the rest of this petition, and ordered that

the petitioners should pay the whole costs thereof.

The present information charged, amongst other things, that it was the intention of the said testator that the whole income of the said property and funds by his will given for the purposes of the school, so far as the same should be required, should be applied to uphold and maintain the said school for the benefit of the inhabitants of Tiverton; that it was the intention of the testator that the school should be a free school, and that the benefits thereof should be enjoyed by free scholars only; and that it was contrary to the intention and meaning of the testator that there should be any boys in the school whose parents paid towards their education therein, whereas a large majority of the boys then educated at the school were taken as boarders by the master and under-master, who received considerable annual payments from their parents, for their education in the school to the detriment of the free scholars; that a considerable part of the exhibitions and scholarships had of late years been bestowed on boys who had received their education as such boarders as aforesaid, in evident obstruction and violation of the intention of the said founder, and the advantages of being eligible to such exhibitions and scholarships were held out by the defendants, the masters, to induce boys to enter the said school as such boarders as aforesaid; and the information prayed that it might be referred to the Master to inquire and state of what the said charity property consisted, and what was the clear income and annual value thereof, and that it might be declared that the whole surplus income of the said charity property, after providing for the said exhibitions and scholarships as they at present existed, ought to be applied to the upholding and benefit of the said school; and that the benefits arising therefrom ought to be confined to free scholars only; and that it might be declared whether the said master ought or ought not to receive any payments from the boys educated in the said school, and ought or ought not to take such boarders as aforesaid; and whether none but boys educated as free scholars in the said school, according to the directions in the said will, ought to be eligible to the said scholarships and exhibitions; and whatever the opinion of the Court might be as to the construction of the said will, and the constitution of the said charity, that it might be referred to one of the Masters of the Court to settle a proper scheme for the general regulation and management of the said school, and the proper application of the surplus income thereof, having regard to the said declaration; and that, in settling the scheme, the Master might be at liberty to consider whether, having regard to the said will and intent of the said testator, and the present condition of the town, and the increased income of the property, it would be proper to add to the number of ushers and assistants in the school, and to augment the salaries of the present master and under-master; and whether it would not be proper that some and what part of the surplus income of the said property, after providing for the education in grammar, as by the will directed, should be applied in providing instruction in matters of science and literature, including the modern languages; and that he might be at liberty to include such directions, provisions and regulations in the scheme to be settled by him as he might think proper; and that it might be ascertained and declared what persons were meant and intended under the description of foreigners in the will mentioned, and that the manner in which the children of such foreigners were for the future to be received and admitted into the school, according to the directions in the will, might be fixed and declared; and that some proper qualification might be determined upon for the ten householders in the will mentioned in lieu of the qualification therein prescribed, and that, if necessary, it might be referred to the Master to settle a scheme for the purpose; and that the Master might be directed to settle some proper scheme for the management of the property of the charity; and that it might be declared that the feoffees ought to be persons residing in the town of Tiverton, or its immediate neighbourhood; and that the Master might inquire where and at what distances from the town the several persons who were then trustees of the charity resided, and such of the said feoffees as should appear to be residing out of England, or at such a distance from the town of Tiverton as the Court might be of

opinion was beyond the distance at which the feoffees ought to reside, might be removed from being feoffees, and that some proper persons might be appointed to be feoffees in their place; and that all proper directions might be given, and inquiries made for effectuating the objects aforesaid, and for securing a proper administration and application of the charity property and the income thereof for the future.

Mr. Bethell, Mr. Walker, Mr. Blunt, and *Mr. Heathfield,* in support of the information, contended, that the circumstances under which this charity existed rendered it necessary that a new scheme for the management of the school should be framed. It was evident that the school did not, in its present state, answer or fulfil the original intention of the founder: on the contrary, it had been conducted on a principle which was alien to and a departure from the design of the charity. The funds were consumed to a considerable extent in a manner consequent upon these alterations, and therefore in a manner not warranted by the intention of the founder. From these causes, it was desirable that the school should now be brought back to the plan and system upon which it was originally settled, and at the same time accommodated to the exigencies of the people for whom it was intended. viz. the resident inhabitants of the town of Tiverton. The first objection was, that of allowing boarders to be taken by the masters. Nothing could be more opposed to the intention expressed upon the testator's will than this system. The school had become a source of profit to the masters by means of the boarders, and every advantage was held out for the boarders, while every discouragement was shewn to the free scholars. The principle of the charity was completely altered, and the boys had necessarily become the children of the rich, instead of being selected, as the founder directed, "without regarding the rich above or more than the poor." For these boarders the masters received considerable emolument, and the desire of the testator was departed from, "that the Masters should be satisfied and content with the recompense provided for them, without seeking any more either of parents or children, which procureth favour to givers and the contrary to such as do not or cannot give; for the testator's meaning was that it should be for ever a free school, and not a school of exaction." The object of the relators was, that the number of boarders should be limited, and that such boarders should only be received upon the terms of not being allowed to compete with the native boys for scholarships and fellowships. To effect this change it would, no doubt, be necessary to increase the salary of the masters and ushers, who at the present time could not conduct the education except by the increased emolument derived from taking boarders. Another object the relators had in view was to adapt the system of education to the wants of the town. It was true that the testator had directed that none but grammar scholars should be admitted; but it also was evident that he meant to provide such an education as would best suit the wants of the people of Tiverton; and a school might still remain a grammar school, although a more general education might be adopted. The object of the founder was to extend the benefits of a classical education to the children of the lower classes, and it could never have been his wish to confine that education to the teaching of Latin and Greek only.

Cases cited on behalf of the relators:—

The Attorney General v. *Lord Clarendon*, 17 Ves. 491.
The Attorney General v. *the Coopers Company*, 19 Ibid. 187.
The Attorney General v. *Hartley*, 2 Jac. & Walk. 353.
The Attorney General v. *the Earl of Stamford*, 10 Law J. Rep. (N.S.) Chanc. 58, 172, and 12 Law J. Rep. (N.S.) Chanc. 297; *(the Manchester School Case)*.
The Attorney General v. *the Dean and Canons of Christchurch*, Jac. 474.
In re the Rugby School, 1 Beav. 457.

Mr. J. Parker, Mr. Rolt, Mr. Stinton, and *Mr. Roundell Palmer,* for the feoffees of the charity, contended that it was the intention of the founder that boarders should be received in the school; for by using the term "foreigners," when he directed that such foreigners should be selected in a particular manner, it was clear that he must

have seen the possibility of their being obliged to reside in the school. The salary provided by the testator was not sufficient at the present time to provide competent masters for the school; and unless they were allowed to take money for the admittance of such boarders, it would be impossible, with the limited funds of the charity, to procure the assistance of sufficiently qualified teachers. Supposing the present system of taking boarders were not strictly in accordance with the expressed intention of the founder, it was clear that the practice had worked well for a great number of years. The school, instead of being confined to the town of Tiverton, had extended its advantages throughout the kingdom; it had become a national institution. Upon the subject of the species of education now adopted at the school, it was strictly in accordance with the terms of the will; it was a grammar school, and the education afforded was the same as at all other grammar schools, and was best calculated to prepare the boys for gaining those scholarships and fellowships which formed part of the advantages of the charity. Whatever might be the pretended wants of the inhabitants of Tiverton, in regard to extending the system of education, it was still to be borne in mind that the founder had provided for the election of foreigners to the town, and those who were resident in the town were to be grammar scholars; and none of these boys would be able to avail themselves of the different exhibitions attached to the charity, unless the present classical education were continued. If any other method of education were to be provided, to suit the wishes of the natives of Tiverton, they would not be able to attain that degree of qualification necessary to enjoy the advantages of the charity.

October 29.—The Vice Chancellor.—In this case the first point, as it appears to me, is, upon what principle shall the questions in the cause be decided? And when that is determined, then the other questions which are actually in the cause will be the subject of determination. Now, it appears to me, having regard to what took place in the case of the Manchester School, that that question—the first question—the great question, has been, in effect, decided; because I observe that the present Lord Chancellor, when he gave his judgment upon those matters connected with this case, which were brought before him in the year 1840, expressly referred to the principle which he had laid down in the Manchester School case. To me, in a great degree, what had taken place in that case was new, and I therefore felt an obligation to study with the greatest attention what had taken place in that case, so far as it appeared from the judgment which had been given, first of all by the present Lord Chancellor, and then the judgment which was given by my Lord Lyndhurst, when the decree of Lord Chancellor Cottenham was brought before him upon appeal. Now, it is perfectly true, that there was some difference of opinion between those noble and learned Lords as to some part of the case, but there was no difference between them with respect to the great and important question, what should be the rule upon which the decision should turn, because my Lord Chancellor Cottenham, in giving his judgment, rested himself upon the statutes of the school; and when my Lord Chancellor Lyndhurst, upon the appeal, thought it right in one respect to vary the decree of Lord Chancellor Cottenham, he varied it because he thought there was a portion of the statutes of Manchester School which made it right for him so to vary it. My Lord Chancellor Cottenham certainly entertained the opinion that, according to the construction of these statutes, boarders ought not to be admitted. My Lord Chancellor Lyndhurst, when the case was brought before him, adverted to that most remarkable language which is contained almost in the very last clause of the statutes, which language gave a power to the trustees "to augment, to expound, to increase, to enforce, and to reform the statutes;" and he thought, although there never had been any express alteration in the form of a written rule or order, yet, inasmuch as the fact of taking boarders must have come within the cognizance of those trustees, who had power to vary the law, and they permitted it to continue, that it must be taken as being equivalent to an alteration in the law in that respect; and even with that he did not at once come to the conclusion that there should be boarders, but referred it to the

Master to consider whether, under any circumstances of contingency and so on, it would be right that the practice should continue. But I have, from the two judgments of those noble and learned Lords, taken the rule unquestionably given, that for the purpose of determining what shall be the rule to govern, it is the duty of the Court to look at the founder's statutes.

The great question in the cause, that has agitated the minds of the parties so much, has been this, whether boarders shall be taken into the school at Tiverton; and for the purpose of determining that question, it is necessary for me to look into the will of the founder, and point out that which appears to me to be the clear construction of his will. A great part of this will is occupied with matter which has very little relation to the subject. Several legacies are given, legacies to individuals, and to the principal companies in London; and then the will proceeds in this way,—" I will that my executors, or the survivors of them, by the advice and directions of my feoffees, and of the survivors of them, with all convenient speed, upon a fit and convenient plot and piece of ground in Tiverton aforesaid, by my executors for that purpose to be purchased and procured, shall erect and build" certain buildings, which he particularly describes, which seem to be, in the first instance, a school of a given length and breadth, which is to have a hall, buttery, and kitchen, with rooms over them. Some particular directions are given as to the construction of these other buildings, that they are to have chimnies, and so on; and it is directed generally that the master shall have the use of these rooms, but the use of one of them in particular is stinted to the usher. Then he directs that a certain sum shall be laid out—a sum of 2,400*l.*; and having done that, he says,—" Item, my will and meaning is, that in the said school shall not be taught above the number of 150 scholars at any one time, and these, from time to time, to be of children born, or for the most part before their age of six years brought up, in the town or parish of Tiverton aforesaid; and if the same number be not so filled up, my will is, that the want shall be supplied with the children of foreigners, and those foreigners only to be received and admitted from time to time, for ever, with the assent and allowance of such ten householders." Now I just stop here for the purpose of making this observation, that the language of this gentleman is certainly very obscure, because here he has used at once the phrase "foreigners" as applicable both to the children and to the parents of the children; but I think it is reasonably evident upon the face of the will that by the expression "children of foreigners, and those foreigners only," &c., he did collectively mean to describe, not so much the children of foreigners, that is, of people not belonging to Tiverton, but as children who bore a contradistinction from those first named, which children first named are children born in the parish of Tiverton, which is one characteristic that would enable them to be chosen, "or for the most part before their age of six years brought up in the parish of Tiverton." Consequently, therefore, if none of those could be supplied, or not a sufficient number, then the testator means, as I apprehend, to say, that children who are not born in the parish of Tiverton, and not for the most part brought up before their age of six years, should be eligible. That would, therefore, be a general description of any children other than those who are first marked as the objects of selection. Then he says, "And those foreigners only to be received and admitted from time to time for ever, with the assent and allowance of such ten householders of the said town of Tiverton aforesaid as for the time being shall be most in the subsidy books of our Sovereign Lady the Queen's Majesty and of her successors for ever, and not otherwise; and my meaning and desire is, that they from time to time will make choice of the children of such foreigners as are of honest reputation and fear God, without regarding the rich above or more than the poor; and that no scholar should be or continue in the said school, as a scholar, above the age of eighteen years or under the age of six years, and none under a grammar scholar; and my will and meaning is, that the said schoolmaster shall have for his use" certain rooms on which nothing at present turns. Then he prescribes that the usher shall have one chamber; and then he directs that the master shall have yearly for ever 50*l.*, to be paid quarterly, and the usher twenty marks, to be paid, in like manner, quarterly.

Then he proceeds to name a certain number of persons as devisees, and to direct certain payments, and gives a direction with respect to matters of husbandry, which is a very small and minute question, and can be very easily disposed of; but then he adds these emphatic words,—"And my hope and desire and will is, that they (that is, the master and usher) hold themselves satisfied and content with that recompense for their travail, without seeking or exacting any more either of parents or children, which procureth favour to givers and the contrary to such as do not or cannot give; for my meaning is, it shall be for ever a free school, and not a school of exaction."

Now, the language that is used in the statutes of the Manchester School with reference to the same object is, that they shall be taught "without any money or other rewards." The language here is what I have just now stated, and it is a remarkable fact, that this expression "and not a school of exaction," seems to have a counterpart, and probably itself was borrowed from the very similar phrase which is found in the statutes of Eton College, which by reason of an accidental circumstance I happened to become more minutely acquainted with after the hearing of this cause than I was before. Mr. Bethell will recollect the occasion when they were discussed so much at the Judicial Committee of the Privy Council. It is where mention is made of the master, expressed in these words—'Necnon unius magistri sive informatoris in grammatice, qui dictos indigentes scholares aliosque quoscunque et undecumque de regno nostro Angliæ ad dictum collegium confluentes in rudimentis grammatices gratis absque pecuniâ aut alterius rei exactione debeat informare." It appears to me that there is no ambiguity upon the words themselves. The only question would be, if it could be a question at all whether the taking of boarders was comprehended within these words; but it seems to me that if it is at once said that it shall be for ever a free school, and not a school of exaction, that the masters shall teach without seeking or exacting any more than the salaries either of parent or children, which procureth favour to the giver, and the contrary to such as do not give, that it is most manifest boarders must be excluded, because you cannot conceive any system of keeping boarders, carried on by the master and the usher, which will not bring to the master or the usher other profit than that which might be derived merely from the salary; and however difficult it may be to estimate the exact profit, certain it is that the boarders would not be kept unless a profit were yielded: and therefore either from the boarders, or their parents, or from those who take on themselves the expense of their keeping, something would be extracted in the shape of an exaction or a demand, ultra that with which the founder intended the master and the usher should be content. And it really does appear to me, that if it was the clear opinion, as it unquestionably was, both of Lord Chancellor Cottenham and of Lord Chancellor Lyndhurst, that the words to which I have just referred, in the statutes of Manchester School, "without money or rewards," would forbid boarders, it follows as a necessary conclusion that these words, which, though not the same, are more explicit in the sense that they do, upon their own face, unfold the inward meaning of the founder himself; and I must take it as a rule laid down by the founder, that boarders shall not be taken. And it does not appear to me that any such answer to that position can be given from the statutes laid down in Blundell's will as was afforded to the understanding of Lord Chancellor Lyndhurst by those final words which are found in the statutes of the Manchester School, because there is nothing in the words which are actually contained in this will as to the dealing with the charity, which seem to give any sort of discretion to the trustees, at all analogous to or equally forcible with the words which are laid down in the Manchester statutes. What the testator does say is this:—After giving certain directions about the matters of husbandry, he says, they shall "set down such orders, laws, and directions, both touching the said school and husbandry, and all matters and circumstances thereof, and touching all parties to be interested therein, or to have anything to do about the same, as to them, or the most part of them, for the time being, shall be thought meet for the governance, maintenance, and continuance thereof, according to my true intent and meaning, and that the schoolmaster and usher for the time being shall be elected,

nominated, displaced, and removed, by the said feoffees for the time being, for ever, or the most part of them, having always the approbation and allowance of the ordinary of the diocese of Devon." Now it is plain, therefore, that he did mean, subject only to one controul, to give the trustees the absolute power of displacing the master and the usher; but when he gives them the power to make such orders, laws, and directions, both touching the school and matters of husbandry, he says, "as shall be thought meet for the governance, maintenance, and continuance thereof, according to my true intent and meaning;" and therefore what he meant was, that they should make from time to time such rules and orders as should be according to his true intent and meaning, but not such rules and orders as should directly contravene and subvert and abolish his true intent and meaning. And therefore as I have felt all along the strongest feeling that such a noble and useful institution as Blundell's School has been, and is, should be preserved, and though there is a great deal of evidence given by very sensible persons, who must be good judges of the matter, namely, that boarders should be continued, yet I really find myself bound down by the imperious positive language of the founder, to hold that boarders cannot be continued; and all I can say is this, that if any result of a decree founded upon such a position, shall be an event found detrimental to the school, Parliament can alone interfere by its authority, and set aside the damage, if there really be any. It appears to me, therefore, upon the best consideration that I can give to the subject, that there ought not to be boarders.

I must here make an observation that with respect to the admission of foreigners them selves (for I have sufficiently defined who are the foreigners), it appears to me that there has been certainly a failure of the testator's intention, who meant clearly by his will this: that where there was a failure of the boys of the first class, boys of the substituted class should be chosen by the trustees, but with "the assent and allowance" as to their admission, of certain persons described as the ten householders, he says, "who shall be most in the subsidy books of her Majesty the Queen and her successors." Subsidy books, it appears, have gone out of use, and of course therefore, for a long while, there has been no such collection of ten householders to give an assent as was contemplated by the testator. But, as I understand the facts, the trustees seem to have pursued this course: they elected foreigners upon a deficiency of native boys, and when exhibitions were to be granted to the foreigners, then they seem to have required that there should be that—I can hardly characterize it as anything else than the—most whimsical form of exhibiting a shadow, which is detailed at length in one of the exhibits, but which appears to me is not such a thing as the Court can allow to continue, as a substitute for that which the testator has defined himself, as something absolutely necessary in order to carry into effect the election of the foreigner at the time when he is first admitted into the school. My notion therefore is upon that point, that it must be referred to the Master of this court to determine who shall be the ten householders, having regard to the testator's will. Of course I do not at present stint the Master to any view that he may take, but certainly I may say this much, that it does not appear to me the scheme, as to the selection of the ten householders, which was proposed by the trustees, is at all a scheme which is commensurate with what the testator meant; because what a man merely spends is hardly a proof of what he has; and it is plain that the testator meant that those who appeared to be the most wealthy should be the persons with whom the nomination should rest, and therefore it might be a matter for the Master to consider, whether, for instance, actual revenue which might be ascertained by certain public books should not be taken into consideration as well as the amount of taxes which a gentleman might happen to pay in Tiverton. I only mention that because it appeared to me, if the Court could mention anything that might tend to enlarge the view of the parties or of the Master, when he is considering this subject, it would be advisable—of course it does not bind him.

Having stated my opinion as to who foreigners are, and what ought to be done with respect to the admission of foreigners in regard to the assent to be given by the ten householders; the next question that has been raised (I admit but faintly) is, whe-

ther this school is altogether to be considered as a grammar school. I allude certainly to several observations which are perfectly fresh in my mind, (because I only read them very recently all over) that Mr. Bethell made on that part of the subject. Now I cannot but think that there is no question upon the point, that by "grammar school" the testator strictly meant, a school in which at least Latin and Greek should be taught, and that it is confirmed from this fact, that in the subsequent part of the will, he speaks of the students in divinity, who (after the first six who from necessity are to be found without reference to the school) should be supplied by scholars from the school; and of course there could be no such thing, according to my notion, as a student in divinity, who, at least, had not been taught both Latin and Greek. I do not think there is any difficulty about that; and taking it for granted therefore that it was a grammar school within the meaning of the statute relating to grammar schools, upon looking at the statute I myself see no reason why there should not be a scheme for the purpose of giving instruction in other matters than merely Latin and Greek, provided only that there is such a surplus income as will pay the necessary expense of so doing.—[His Honour here referred to the 3 & 4 Vict. c. 77. ss. 1, 2, 3 and 4 (1).]

Now, I advert to those sections particularly, because I observe that what is really sought by the Attorney General and the relators in this information, is only that the surplus itself shall be so applied; and I do not observe that there is any attempt made or any desire expressed in the slightest degree by any one that the fundamental rules of admission to the school shall be in the least varied; and they are themselves expressed in language so clear, that it does not appear to me there reasonably can be any doubt, because, independent of the question of natives and foreigners, which I have treated of, the rule is, that there shall be none but boys in the school, none under the age of six, or under a grammar scholar, or above the age of eighteen. Now, those are all the qualifications, and it is quite plain, therefore, that the testator did himself require something in the way of exhibition of proficiency or ability, even in the youngest child, that might be brought forward as a candidate for admission into the school, therefore the master must exercise a fair discretion. For instance, if the child were only six years old, is he not really under a grammar scholar in the fair sense of the word, that is, really, has he received such almost elementary instruction as shall enable him to receive the higher instruction which is to be given by the master of a grammar school? There may be some difficulty about ascertaining that; but it is perfectly plain that some proficiency is necessary, and some ability must be exhibited. And I mention this more particularly, because I see that in the evidence which is given on the part of the relators, a great number of the witnesses are evidently straining their minds to shew that there is a sort of hardship inflicted on the people of Tiverton, who may be in such

(1) The preamble of the first section of the statute, after taking notice of what has been the construction in some cases as to the meaning of the words "grammar school," directs, that the Court shall be at liberty "to make such decrees or orders as to the said Court shall seem expedient, as well for extending the system of education to other useful branches of literature and science, in addition to or (subject to the provisions hereinafter contained), in lieu of the Greek and Latin languages, or such other instruction as may be required;" and the statute has introduced certain limitations in some of the following sections. It is enacted in the second section, "That in making any such decree or order, the Court shall consider and have regard to the intentions of the founders and benefactors of every such grammar school, the nature and extent of the foundation and endowment, the rights of parties interested therein, the statutes by which the same has been hitherto governed, the character of the instruction theretofore afforded therein, and the existing state and condition of the said school, and also the condition, rank, and number of the children entitled to, and capable of enjoying the privilege of the said school;" and then in the third section, "That unless it shall be found necessary, from the insufficiency of the revenues of any grammar school, nothing in this act contained shall be construed as authorizing the Court to dispense with the teaching of Latin and Greek, or either of such languages, now required to be taught, or to treat such instruction otherwise than as the principal object of the foundation;" and in the fourth section, "That in extending, as hereinbefore provided, the system of education or the right of admission into any grammar school, in which the teaching of Greek or Latin shall be still retained, the Court shall not allow of the admission of children of an earlier age or of less proficiency than may be required by the foundation or existing statutes, or may be necessary to shew that the children are of capacity to profit by the kind of education designed by the founder."

petition of appeal, presented by Dr. Kettle, and others, for the purpose of discharging the order, which was made upon the second petition in the matter, praying that certain gentlemen named might be at liberty to attend the Master, upon which I made the order. But I made this direction, that they should have liberty to go in before the Master. As to a certain portion of the petition, no direction was given; but as to the rest of the petition, I directed the petitioners to pay the costs. As far as I can recollect, my particular reason for doing that was, that I thought there was introduced into the affidavits in support of that petition a great deal of discussion on the question, which has certainly rankled in the minds of the Tiverton people, how far there had been what was called unfairness in the administration of the school, as between the natives and the foreign boys; and as far as I recollect, I think that was the reason I had for making a distinction between the costs. But so far as it was a mere general matter, the costs of that petition should, of course, be paid in the same manner as the costs of those who originally obtained the order in 1839; and I observe, from the language which my Lord Chancellor Cottenham has used, that he seemed to think it was not a proper case for making the petitioners pay the costs, and that at least he might reserve them, and he reserves them, as I collect from his Lordship's language, in this sense, that it would depend on the question whether relief should be given on the information, or not. But whether so or not, it appears to me it would be a very unwise thing, and only tend to create further dispute, to burthen these gentlemen with those costs, which in the year 1840, for the reason I have given, I thought it right to throw on them; and therefore it appears to me, that so far as anything has been reserved with respect to the costs by the Lord Chancellor's order, I can dispose of it by giving the costs of the petition, in the same manner as I must give the costs up to the hearing of this information.

Having now gone through all the points of the case, I will read the minutes of the decree which I have myself drawn up: "Refer it to Master Senior"—I have named the Master, because, as the matter has been before him already, he must necessarily have his mind imbued with a great portion of the matter connected with this cause. I am aware it is not usual, but when there is a particular reason the Court is in the constant habit of naming a particular Master—"Refer it to Master Senior, to whom the reference was made under the order of the 4th day of June 1839,"—that is, the order on the first petition of all,—"to inquire and state of what the said charity property consists, and what is the clear income and annual value thereof; and declare that the whole surplus income of the said charity property, after providing for necessary expenses, and the exhibitions and scholarships in the pleadings mentioned as they at present exist," (the very language of the information,) "ought to be applied to the upholding and benefit of the school and matters of husbandry mentioned in the will of the testator, P. Blundell. And declare that neither the master nor the usher of the said school ought to receive any payments from or in respect of any of the boys educated in the said school, or ought to take any boarder, and that none but boys educated as free scholars, viz., scholars free of expense, in the said school according to the directions in the said will, as varied by this decree, ought to be eligible to the said scholarships and exhibitions. And declare that by children called foreigners or children of foreigners,"—he has blended the two together, and that is the reason I use that particular phrase—"in the testator's will, are meant any children who have not been born in the town or parish of Tiverton, or who have not for the most part before their age of six years been brought up in that town or parish. And having regard to the aforesaid declarations, refer it to the Master to settle what salaries ought to be paid to the master and usher respectively,"—I did that for this particular reason, because it is perfectly manifest from the view taken by all parties that this school cannot go on as a grammar school with only the original salaries appointed by the testator, if you take away the subsidiary assistance derived from keeping boarders. When I say "keeping boarders," I should mention this, which did not occur to me at that time: the masters seem to have taken fees in the shape of annual payments from boys who are not boarders; of course that is to be utterly done away with. "And to settle a proper scheme for the application

of the income for the benefit of the said school and the said matters of husbandry." I put it in that general form as to husbandry, for it is not worth while to have any further discussion upon it. "And in settling the said scheme, the Master is to consider whether, having regard to the said will of the said testator, and the present condition of the said town and parish of Tiverton, and the increased income of the said school, it would be proper to add to the number of ushers and assistants in the said school,"—that is suggested by the language of the information, and I thought it very proper. "And whether it would be proper that any and what part of the surplus income, after providing for the education in grammar as by the said will directed, shall be applied in supplying instruction in any and what matters of science and literature, including some one or more and which of the modern languages; and he is to include such matters in the scheme to be settled by him as he may think proper, and inasmuch as no such subsidy books as are in the said will mentioned are now used, let the Master fix and declare what shall be the new proper qualification for the ten householders in the said will mentioned, in lieu of the qualification therein prescribed; and declare that in future no foreigners shall be received and admitted from time to time into the said school, except with the assent and allowance of the ten householders having such new proper qualification." I have added that, because it was my intention throughout to uphold the spirit as much as I possibly could, and the very language of the testator's will; and here I am only now submitting this new proper qualification in lieu of the qualification which he thought it proper to appoint, and which has failed by accident; and I have said nothing here about the ten householders with reference to the case of the husbandry, because it is provided by the will that the same ten householders, as I understand it, shall be the judges in respect of the husbandry—men who are appointed to be the judges for the purpose of confirming or ratifying the election made by the trustees of foreigners into the school. "And let the costs of the relators and defendants in this cause up to the hearing,"—I add, up to the hearing, for a reason I have before given, that it may be very right to give costs up to the hearing, but there might be conduct afterwards which might make it necessary to depart from the rule: that is always the rule unless there is some reason subsequently arising which makes it right to depart from it. "And let the costs of the relators and defendants in this cause up to the hearing, and the costs of the petitioners in the petition of Dr. William Kettle and others, presented on the 29th of May 1840, and of the respondents thereto," be taxed by the Master, and paid by the defendants, the trustees, out of the monies in their hands belonging to the said charity: and reserve the consideration of further costs in this cause, and of all further directions, with liberty to apply.

V.C. Nov. 4. } RUSSELL *v.* NICHOLLS.

Ward of Court—Petition for a Settlement.

A lady who was entitled to property upon attaining twenty-one or marriage, married under age:—Held, that this contingent interest in property was sufficient to entitle her to be made a ward of court; and that her mother, although in the light of a stranger to the property, might present a petition to have a settlement under a decree of the Court.

This was a petition presented by Mrs. Russell, the mother of a young lady, who married Mr. John Bush, shortly after she had attained the age of seventeen years, without any settlement being made, and (as the petition represented) without her mother's consent. It was stated on the petition, that Mrs. Bush was entitled under her grandfather's will, to certain property, upon her attaining the age of twenty-one or marriage, and that she had joined with her husband in assigning this property to a person named Arden, who had obtained a stop order to prevent the fund being paid to any one but himself.

The petition prayed that the young lady's property might be settled under a decree of the Court, and that the fund to which she was entitled might not be paid to her husband in the meantime.

Mr. Stuart and *Mr. Hallett*, in support of the petition.

Mr. Toller, contrà, urged that the petitioner, the mother, was in the position of a stranger to her daughter's property, and had

no right to come to the Court to have it settled; and that as the daughter had no property in possession at the time of her marriage, such property being left to her upon attaining twenty-one or upon marriage, she could not be made a ward of court. The case of *Leeds* v. *Barnardiston* (1) was cited as an authority.

The VICE CHANCELLOR.—It appears to me, that in this case the lady was properly made a ward of court: she was a co-plaintiff in the bill which was filed, and she had in fact some property in possession, and might have been entitled to other property, that is, she had a vested right in other property, but that is of no importance. If she had only a contingent interest in the property, that would be property which the Court would take care of for her. As to the case cited from *Simons*, I do not now recollect it very well; but I do not think there was any question whether the marriage had taken place or not. Now, here, it appears that Mr. Bush married the lady shortly after her attaining seventeen. She was twenty-one last September. The mother might have consented to the marriage, but that does not affect the question. The mother presented this petition, praying that a settlement might be made; and it appears to me that the petitioner is perfectly right. Then Mr. Arden, by an indenture which was dated in September 1844, took a large assignment from the husband of the lady, of property in which she was interested; and, I think, on the face of the indenture, he must have had notice of her being a ward of court, because there was actually a reference to this suit, and he might have ascertained the fact from the pleadings. Then he presents a petition, praying a stop order, that no part of the property might be transferred without notice to him. Now, it appears to me that he might have obtained a stop order, that no part of this fund should be transferred to Mr. Bush without notice to him; and such an order would not have affected this petition. But he has obtained a larger stop order than he was entitled to; and therefore, as against Mrs. Russell, the order should be discharged with costs; and I think it would be right, there being nothing special in the case, that it should be referred to the Master to find whether a marriage has taken place, and then to approve of a proper settlement.

(1) 4 Sim. 538.

M.R. Nov. 12. } LANCASHIRE *v.* LANCASHIRE.

Interrogatories—Commissioner—Examination—103rd and 104th Orders of 1845.

Under the 103*rd and* 104*th Orders of* 1845, *additional interrogatories may be exhibited before the commissioner for the examination of witnesses, during the sitting of the commission as circumstances may require; and it is not necessary to obtain an order of the Court for that purpose.*

This was an application to the Court for leave to exhibit an interrogatory before the commissioners on a commission for the examination of witnesses in the country, to prove a codicil, which was written on the same sheet of paper as the will of the testator. The interrogatories exhibited before the commissioner did not extend to the examination of the witness in proof of the codicil, and the commissioner declined to receive any further interrogatory for the examination of the witness, without the order of the Court being first obtained for that purpose (1).

Mr. Kindersley and *Mr. Bazalgette* supported the application.

The 103rd and 104th Orders of 1845 (2) were referred to.

Mr. Turner and *Mr. Webster*, on the other side insisted, that the applicant ought to have obtained an order of course, instead of coming to the Court; and that if there had been an interrogatory properly framed to prove the codicil, the commissioner would not have refused to receive it.

The MASTER OF THE ROLLS determined, that since the General Orders of 1845 came into operation, new interrogatories might be exhibited before the commissioner, without the necessity of obtaining an order from the Court, and directed, that no order in the present case should be drawn up; but the costs of the present application were allowed to be costs in the cause.

(1) A full statement of the circumstances of the case will be found in 15 Law J. Rep. (N.S.) Chanc. 293.

(2) Ord. Can. 324; 15 Law J. Rep. (N.S.) Chanc. 294.

V.C. Nov. 8. } KINGHAM *v.* LEE.

Baron and Feme—Waste—Tenant for Life.

An estate was given to a lady for life, with a direction not to commit waste. The lady married, and acts of waste were committed by her husband. Upon her death, a bill was filed for an account of waste and dilapidations:—Held, upon demurrer, that the wife's estate having, by her marriage, become vested in her husband, her husband was alone responsible for the waste, and the legal personal representatives of the wife were not necessary parties to the suit.

Thomas Harding, by his will, dated the 16th of April, 1805, gave and devised all his freehold and copyhold estates, whatsoever and wheresoever, to his wife Ann, for and during the term of her natural life, she keeping the said premises and the buildings in good and substantial repair, and committing no manner of waste, and not selling any timber thereon, except what should be necessary for, and to be employed in, repairing the buildings, and cutting the underwood in regular fells, as he had usually done. And the testator gave and bequeathed the rents and profits thereof to his wife until the day of her decease; and from and immediately after her decease, he gave and devised all his said freehold and copyhold estates to Richard William Bunting, his heirs and assigns, upon trust, after the death of his wife, to sell the estates, and pay one moiety of the proceeds thereof to James Kingham for life, and afterwards to his children, in manner therein mentioned; and to pay the other moiety to William Kingham for life, and after his decease to the children of the said W. Kingham, in manner therein mentioned. The testator died shortly after the date of his will, and his widow, Ann Harding, some time afterwards, intermarried with Roger Lee.

By a deed, dated in September 1834, between the parties entitled to the estates after the death of the widow, the said parties elected to take the estates so settled, instead of the money to be produced by the sale thereof; and thereby the interests of the parties then entitled became vested interests, instead of being contingent on their surviving Mrs. Lee.

Upon the death of Mrs. Lee, an estimate was taken of the dilapidations which had taken place in the buildings on the estate, and the repairs reported to be necessary amounted to about 100*l.*; and Mr. Lee having refused to pay such amount, a bill was filed by the persons entitled in remainder, against R. Lee, and against the legal personal representatives of his wife, praying that an account might be taken of the dilapidations, and other acts of waste committed upon the estate, and that they might be declared liable to pay the same. A demurrer was put in to this bill by the representatives of Mrs. Lee, on the ground that they were not necessary parties to the suit.

Mr. Bethell and *Mr. Hargrave*, in support of the demurrer, contended that there could be no bill for satisfaction of waste which did not pray an injunction, and that the personal representatives of the wife of R. Lee were not necessary parties to the bill. There could be no account granted against an estate which had not received benefit from the committal of the waste. The wife, by her marriage, had parted with all her interest in the estate to her husband, and he alone was responsible for the acts of waste that had been committed. In support of this argument the following cases were cited—

Jesus College v. *Bloome*, 3 Atk. 262.
Lansdowne v. *Lansdowne*, 1 Jac. & Walk. 522.
Monypenny v. *Bristow*, 2 Russ. & M. 122; s. c. 1 Law J. Rep. (N.S.) Chanc. 88.

Mr. Stuart and *Mr. Campbell*, in support of the bill, contended that the lady who was tenant for life did not lose her liability for any acts of waste by her marriage. It could not be said that she had derived no benefit from the acts committed, and no difference could be made after coverture between what was done by the husband and what was done by the wife. They were, to a certain extent, trustees for the protection of the remainder-man. She enabled her husband, by her act, to commit the waste. It therefore could not be unnecessary for the remainder-man to bring before the Court the representatives of the tenant for life

during whose interest all the waste had been committed. Cases cited—

Clough v. *Dixon*, 8 Sim. 594; s.c. (as *Clough* v. *Bond*), 8 Law J. Rep. (N.S.) Chanc. 51.

Marquis of Ormonde v. *Kynersley*, 5 Mad. 370.

The VICE CHANCELLOR.—I do not accede to the proposition, that the estate devised to the wife was a trust in her. It was devised to her in certain words which did not exempt her from the obligation that every tenant for life is under not to commit waste; and though in a certain sense the language put into the mouth of Sir J. Leach, in *Lord Ormonde* v. *Kynersley* may be right, I think that it is rather metaphorical than correct according to the view of the law. It is important that the thing should be distinctly understood, for if it is to be laid down, that where an estate for life is given, so as to leave it incumbent on the tenant for life not to commit waste, the tenant for life is in the position of a trustee, and the consequence would be it would impede the conveyance of the estate. Because, if it were a trust estate, we must then consider what is the course of dealing with such an estate. Is it the practice, where a person is made tenant for life, liable in any degree for waste, that upon a conveyance of the estate there shall be any special covenants by way of indemnity with the alienee as to the acts of the tenant for life? I apprehend that such estate is as clearly the estate of the party who has received it by gift, for all purposes of transmission, just as if there were no trust imposed upon it. I admit, that where an estate is devised for a definite purpose, for terms of years or any other estate, clothed with an express trust, as, for instance, to sell and pay debts, or raise portions, and so on, the alienation of the estate would be a breach of trust: because, if the person aliens, that is an admission that he has taken the estate; and, if he has taken the estate, he can do nothing but execute the trust; he cannot convey it, because he has no authority to vest the estate in any other persons even in execution of the trust, but he is bound to execute the trusts. If I am to hold that such an estate has actually created a trust in the tenant for life, I should be, in the first place, laying down a new proposition, and attempting to throw the greatest difficulty in the way of ordinary dealing with such an estate. I am not intending to question at all, that where a person takes an estate liable in any degree to impeachment of waste, that there this Court will interfere to stop waste: and if the effect of the waste is made beneficial to the person committing it, the party or his assets will be responsible. I do not impeach this doctrine; but it is my clear opinion, that the estate which Mrs. Lee took was her own beneficial estate, and I also think the necessary consequence of it is, that if she had by grant or otherwise, with or without consideration, conveyed it to a stranger, she would in no manner, at law or in equity, have been responsible for the future acts of her grantee. Let us understand what is the real effect of the marriage. By marriage, the sole interest which she had ceased; and she and her husband became, in the eye of the law, seised in her right, but the whole beneficial interest is in the husband, and he is entitled to all the rents and profits; and really it appears to me the case differs from a case of express trust, created in land, and also from the common case of executor or administrator, because, in the case of an executor or administrator, the party takes in the character of trustee: it is his duty. A party is compellable at law, as executor or administrator, to account faithfully for all assets he has received; therefore I can understand how it can be very easy at law, if the lady becomes administratrix, and marries, and the assets are wasted, that the creditor may bring an action against her; but it is because the very character she assumes is the character of trusteeship, for the benefit of others. In this case it is nothing more than the estate being devised to this lady, impeachable for waste: she married, and the husband did various acts of waste, by which he had a benefit. It is not necessary to go into the specific charges on this point, or whether he is liable or not: there are certainly some acts of waste alleged against him, for which he may be responsible; but my opinion is, in the absence of any authority to support the objection, that the wife had, by law, a clear title to give, by the act of marriage, to the husband such interest in her life estate as by the law he would receive by marriage;

and the owner of the estate is himself responsible for his own acts, and that there is no responsibility affecting her. I think this is a very fearful experiment tried, for the purpose of incumbering the estate. The demurrer must be allowed.

WIGRAM, V.C. July 2, 3, 14. } DOYLE AND OTHERS *v.* MUNTZ AND OTHERS.

Parties—Plea—Joinder of Co-Plaintiff having no Interest.

To a bill by A. and B, on behalf of themselves and all the other shareholders of a company provisionally registered, against the provisional directors, charging malfeazance and misapplication of the assets, and praying an account of the costs, &c., properly incurred by the defendants, and of the application of the assets in discharge of the liabilities of the company, and a division of the surplus rateably among the shareholders, a plea in bar by a defendant, that B. had assigned for value all his interest to C, was allowed, on the grounds, first, that B, after the sale of his shares, had no interest in the relief prayed, namely, the winding up of the concern, and the division of the surplus; secondly, that, under the frame of the suit, he could not ask the relief on the ground of a right to be indemnified from the liabilities of the company; and, thirdly, that in a suit by some on behalf of all the others, the assignor of the shares could not adequately represent the beneficial interest of the assignee.

This was a bill, by Thomas Doyle and J. W. Scrivener, on behalf of themselves and all other the shareholders of a company, called the "Southampton, Manchester, and Oxford Railway Company," against the provisional directors of the company. The bill, after stating the formation and the provisional registration of the company, and the parliamentary contract and subscribers' agreement, and that the latter deed contained a proviso, that in the event of the act or acts of parliament for the undertaking not being obtained, and the amount subscribed by way of deposit proving insufficient to discharge the costs, expenses, and liabilities which should be incurred in the undertaking, the shareholders of the company should pay, allow, and discharge the deficiency rateably, and in proportion to their number of shares,—stated, that in September 1845, the plaintiffs became and were allottees, the former of twenty and the latter of ten shares in the said company, and that having paid the deposit upon such shares, and signed the parliamentary contract and subscribers' agreement, and obtained scrip, they became and were shareholders in the said company during the whole of the period of the transactions mentioned in the bill; and that they still were such shareholders at the time the bill was filed. The bill then stated, that the object of the undertaking, as set forth in the parliamentary contract and prospectuses, upon the faith of which statement the shareholders had made their subscriptions, was "for making a railway, to commence at or near Andover Road station, on the South-Western Railway, near Highclerc, together with two branch railways therefrom, to commence near Highclerc, one of such branch railways to lead to and terminate at or near the Swindon station, on the Great Western Railroad, and the other to lead to and terminate at the Didcot station, on the said Great Western Railway;" that from the first publication thereof, the projected undertaking was in high repute with the public, as one that was likely to yield large profits to the shareholders, and that the shares rose to a very high premium in the market; that the defendants, instead of carrying out the scheme, as originally proposed, had entered into an arrangement with another company, called the "Oxford, Southampton, Gosport, and Portsmouth Railway Company," by which it was agreed that to save the expense of opposition, the Oxford, Southampton, Gosport, and Portsmouth Railway Company should apply for an act for their proposed line of railway from Didcot, through Newbury, to the Andover Road station of the Southampton Railway, and that the Southampton, Manchester, and Oxford Railway Company should apply for an act for their proposed line of railway from a spot near to Highclerc, on the South-Western Railway, through Hungerford to Swindon; and that as soon as the acts of parliament should be obtained, the two companies should be amalgamated." The bill then charged that such arrangement was wholly inconsistent with the original objects of the company,

and with the views of the plaintiffs in becoming shareholders therein; and that thereby the defendants had, in fact, abandoned to the other company the most profitable portion of the undertaking to which the plaintiffs had subscribed, and had thereby rendered such scheme nugatory and abortive; and that, in consequence, any further prosecution of the undertaking would be prejudicial to the plaintiffs and the other shareholders of the company; and that such arrangement was entered into to meet the private views of some of the defendants. The bill then, after stating various acts of malfeazance on the part of the defendants in allotting and reserving shares, and in misapplying the assets of the company, prayed that it might be declared that, under the circumstances therein stated, the defendants were bound to return, and that they might accordingly be decreed to return and pay, to the plaintiffs the full amount of the deposits which had been paid by them upon their shares, together with interest; or, in case the Court should be of opinion that the plaintiffs were not entitled to have the whole of such deposits returned, but that the same were liable in respect of the expenses incurred in the undertaking, then that an account might be taken of all the costs, expenses, and disbursements which had been properly paid or incurred by the defendants, in or about the matters therein mentioned; and that the amount of such costs, expenses, and disbursements, when ascertained, might be divided rateably on each share of the company; and that for such purpose the defendants might be held to represent, and be liable upon and in respect of all such shares as were so reserved, or had not been allotted by them as therein mentioned, and on which no deposits had been paid, and that the defendants might be decreed to return to the plaintiffs the residue of the deposit so paid by them, after deducting thereout the proportionate amount in respect of each deposit, or that the general accounts of the partnership might be taken; and that in taking such accounts the defendants might be charged with all losses occasioned to the company by their misconduct or neglect.

To this bill, B. B. Williams, one of the defendants, put in a plea, stating that, before the filing of the said bill, the ten shares in the company mentioned to be allotted to the plaintiff Scrivener, and each and every of them, and all the right, title, and interest of the said Scrivener in and to the same shares, and each and every of them, had been, and as the defendant believed for full and valuable consideration paid to and received by the said last-named plaintiff, well and effectually sold, assigned and transferred by him to Henry Heald, &c., or to some other person whose name and address were unknown to the defendant, and by whom the same were afterwards, in like manner, sold, assigned and transferred; and that at the time when the said bill was filed the said ten shares and each and every of them, and all the right, title, and interest in and to the same, under and by virtue of such sale, assignment and transfer, or sales, assignments and transfers, were well and effectually vested in the said Henry Heald, as the purchaser thereof, for full and valuable consideration; and that the said last-mentioned co-plaintiff had not, at the time when the said bill was filed, and had not at any time since had, nor had then, any right, title, or interest to or in the said ten shares, or any or either of them.

Mr. Romilly, *Mr. James Parker*, and *Mr. Bazalgette*, for the plea, contended, that the plaintiff Scrivener had no title to sue, having parted with all interest in his shares; and that, as a mere shareholder, he was under no liabilities to third parties, which would give him an interest in winding up the concern, and that if he were, yet the prayer of the bill was not framed with that view; and that where a plaintiff joined with him as co-plaintiff a person who had no interest the bill could not be sustained; and that the proper way to take advantage of that objection was by plea or demurrer.

Young v. *Smith*, 4 Rail. Cas. 135; s.c. 15 Law J. Rep. (N.S.) Exch. 81.

Cuff v. *Platel*, 4 Russ. 242; s.c. 1 Law J. Rep. Chanc. 2.

Makepeace v. *Haythorne*, 4 Russ. 244; s.c. 5 Law J. Rep. Chanc. 147.

The King of Spain v. *Machado*, 4 Russ. 225; s.c. 6 Law J. Rep. Chanc. 61.

Paye v. *Townsend*, 5 Sim. 395.

Glyn v. *Soares*, 3 Myl. & K. 450; s.c. 4 Law J. Rep. (N.S.) Chanc. 250.

Cowley v. *Cowley*, 9 Sim. 299; s.c. 7 Law J. Rep. (N.S.) Chanc. 259.

Davies v. *Quarterman*, 2 You. & Coll. 257; s.c. 10 Law J. Rep. (N.S.) Ex. Eq. 17.

Mr. K. Parker and *Mr. Hetherington*, in support of the bill, contended, that the legal estate in the shares was still in Scrivener, and that the equitable interest in Heald was well represented by him; that by the assignment Scrivener had not got rid of his liabilities in respect of the partnership, and therefore was entitled to be indemnified; also that the plea was defective in point of form in not stating definitely to whom the shares were sold; and that Scrivener might still be liable to Heald for the purchase-money—*Kempson* v. *Saunders* (1).

July 14.—WIGRAM, V.C.—The question in this case is, whether this plea in bar is good or not. For the purpose of trying its sufficiency, I will assume that at the time the bill was filed, the ten shares and each and every of them, and all right, title, and interest in and to them, by virtue of the sale, were well and effectually vested in Heald for valuable consideration. Then, two questions arise: namely, first, did that fact, if well pleaded, deprive the plaintiff of all right to discovery and relief?—that is, is the plea good in substance? Secondly, is it well pleaded? In considering the former question, I assume that the latter is to be answered in the pleader's favour. Now, on the question, whether the plea is good in substance, the case must depend upon and abide by the same considerations which would apply if Scrivener were the sole plaintiff. If Doyle were to die before the hearing, and his representative did not revive the suit, Scrivener would become the sole plaintiff,—and if that want of interest in Scrivener which the plea suggests, and that state of circumstances would prevent him, as sole plaintiff, from obtaining relief at that hearing, the circumstance of Doyle having his present interest will not alter the case. The bill, if that fact had appeared upon the face of it, would, according to the cases, have been demurrable—*The King of Spain* v. *Machado*, *Makepeace* v. *Haythorne*, *Small* v. *Attwood* (2). That the ten shares were assignable as between Scrivener and Heald, does not admit of doubt; and that they were also assignable as between those parties on the one side, and the company on the other, must, upon these pleadings, be assumed. There is nothing in the bill to exclude it, and nothing to make the assignment illegal in the abstract—*Young* v. *Smith*. Assuming that the ten shares were assignable, and that they were well assigned to Heald, what personal interest has Scrivener to enable him to sustain the suit? It was for Heald, and not for Scrivener, to determine whether the arrangement alleged to have been come to between the Southampton, Portsmouth, and Gosport Railway Company, and the Southampton, Oxford, and Manchester Railway Company could have been supported: whether the acts of the provisional directors would be rejected or adopted, which the bill alleges to have been done by them without consulting the shareholders; and upon the same hypothesis, the manner in which the provisional directors have dealt with the shares and the assets of the company, is a matter in which Scrivener can have no personal interest, so far as the acts of the provisional directors may have merely checked the prosperity of the concern. But it was said for the plaintiffs that, although Scrivener, as a retired shareholder, had no direct interest in the prosperity of the concern, he had an interest in seeing that the assets were properly applied towards the discharge of the liabilities to which he made himself personally liable. This argument, if admitted, would strike out every part of the prayer, and would convert the bill into a bill of indemnity merely; giving to Scrivener a character different from that in which he appears upon the record. It is necessary, however, in my view of another part of the case, that I should suppose Scrivener under some circumstances to be entitled to such an indemnity as the argument suggests. The questions then are—Do those circumstances exist here? and are the statements in the bill such as to entitle him to indemnity, treating the prayer of the bill as adapted to that purpose? I have read every word of the bill for the purpose of ascertaining whether such a case is suggested upon the record; but I do not find it suggested in any part

(1) 4 Bing. 5; s.c. 5 Law J. Rep. (N.S.) C.P. 6.
(2) 1 You. & Coll. 39; s.c. 4 Law J. Rep. (N.S.) Ex. Eq. 1.

of the bill. There is no suggestion of any deficiency of assets which, as between Scrivener and the other shareholders, might render him liable to contribution. Nor is a case stated from which it is to be inferred that Scrivener has made himself personally liable for the demands of strangers against the company, if any such exist. The conclusive answer to this appears to be the fact of the assignment of Scrivener's shares to Heald, and the absence of any express contract between them. A person, who sells his interest in a concern cannot, without an express contract, insist upon his right to interfere in the affairs or conduct of the concern after such sale. If, however, such a case exist, it is incumbent on Scrivener to shew it. The relief asked by this bill, unless warranted by some contract between Scrivener and Heald, is in derogation of Heald's rights. My conclusion therefore, as far as relates to Scrivener, is, that if Scrivener has sold his shares to Heald, the bill does not state a case shewing that Scrivener has any personal interest in the concern entitling him to relief in this suit in respect thereof. But it was said, that Scrivener having signed the subscribers' agreement and the parliamentary contract, and nothing having been done to substitute Heald for Scrivener, he, Scrivener, remained a trustee, or is to be viewed as a trustee for Heald; and in that character represents Heald upon the record. Without repeating that the character in which Scrivener is suing here is not that of trustee, my opinion is, that Scrivener cannot sustain this suit in the view of the case above suggested. But it was said, that this being a bill filed on behalf of the plaintiffs and all other the shareholders, Heald, in respect of his beneficial interest, is included in the general description of other shareholders. That argument is not strictly accurate in point of language. Other shareholders must mean holders of shares other than those held by the plaintiffs, and that observation is not merely formal. The Court in cases like this permits a small number of shareholders to sue on behalf of themselves and others, assuming that the absent shareholders are adequately represented by parties having the same interest themselves. But that rule would not permit a mere trustee, who has no beneficial interest to represent the absent shareholders, that is, to enable a trustee to represent his own *cestui que trust*. If Heald is a shareholder, there is no reason why he should not be in the suit, and why the real case should not be put upon the record. It is further said, that the objection resolves itself into an objection for want of parties, and that the plea, being a plea in bar, would on that account fail. With that argument I do not agree. A plea of want of parties admits the plaintiff is entitled to relief, provided the proper parties are brought before the Court; and it seems impossible to read this record as containing such an admission. Will the Court, at the hearing of the cause permit the amendment, whilst the record asserts that Scrivener is the owner of shares? If so, will Heald join with Scrivener as plaintiff? And if he will not, and he should be made defendant, will he adopt or reject the acts of Scrivener in the suit? These questions appear to me most material in considering the case. In order that the plaintiff may sustain his bill against the plea, it is not enough to shew, that by means of some alteration to be made in the suit, and of some possible course to be taken, the suit is to be made available. It must be shewn, that according to the case made by the bill, the plaintiff will necessarily be entitled to some relief whatever course Heald may take. The plea admits the allegations in the bill to be true, but unless it follows that relief must be given according to such allegations, in spite of the assignment of the shares, the plea will be good. The rule laid down, by Lord Eldon, in *Kemp* v. *Pryor* (3), reversing his former opinion, and after a second argument, must, I consider for the present purpose, apply to a plea of this sort.

The remaining question, namely, as to the form of the plea, is one of greater difficulty, as it appears to me, than that which I have noticed. I do not refer to that part of the plea relating to the assignment, upon which standing alone there would be a good deal of doubt, for that I think is made clear by what follows. It means that there has been a sale or assignment directly from Scrivener to some one else who had assigned them to Heald; and there is a positive averment, that at the time of filing the bill Heald was the owner of the

(3) 7 Ves. 245.

shares. The difficulty I have felt as to the form of the plea, and which has not been wholly removed, is this: that the plea is so general, that there is no detailed statement as to what the real transaction is, which, the defendant says, amounts to a sale of shares, or the assignment of them. It is possible, although I admit it is scarcely to be said to be reasonably probable, that the plaintiff did not know what the transaction was, if there was one, which it must be assumed the plea alluded to. This has been the occasion of the delay in my giving judgment in this case, as to the manner in which I should deal with the plea. The course which I shall take is that which certainly will best meet the justice of the case, and by which no rule of law is violated. I will allow the plea, but give the plaintiff leave to amend, reserving the costs of the plea to be disposed of until the hearing of the cause or further order.

L.C. Nov. 17. } ANSLEY *v.* COTTON.

Legacy—Legacy Duty.

A testatrix directed all her personal estate to be converted into money, and her debts and funeral expenses and legacies to be paid out of the proceeds, and that out of the residue large sums of stock should be appropriated upon certain trusts. She then gave some pecuniary legacies of small amount, and directed that all the said legacies, and all legacies thereinafter given, should be paid free from legacy duty:—Held, that the exemption from legacy duty applied to the bequest of stock as well as to the pecuniary legacies.

The testatrix, by her will, made in December 1839, gave a leasehold house and all her personal estate and effects to trustees, upon trust to sell and convert into money all her personal estate, except the leasehold house, and to stand possessed of the money to arise from the sale, upon trust to pay her debts, and funeral and testamentary expenses, and all legacies thereinafter bequeathed; and to stand possessed of the residue of the said trust monies, upon trust either to appropriate and set apart out of her personal estate a sum of 40,000*l.* 3*l.* per cent. consols, or purchase stock to that amount immediately after her decease. She then proceeded to declare the trusts of that sum of stock; and then in similar terms directed her trustees to appropriate and set apart 6,000*l.* 3*l.* per cent. consols, or purchase stock to that amount immediately after her decease, and then declared the trusts of that stock. She then continued: "I give and bequeath to the several persons next hereinafter named the *several legacies* following, that is to say—[she then gave several pecuniary legacies, none of them being of large amount]. And I hereby direct that all *such several legacies*, as well as any hereinafter given, shall be paid immediately after my decease, and *free of legacy duty*. I give and bequeath to my several servants next hereinafter mentioned the several legacies following [then followed legacies to five servants]: the said five last-mentioned legacies to be payable only in the event of the said legatees respectively being in my service at the time of my decease, or having quitted it through sickness or infirmity." She then bequeathed an annuity for the life of the annuitant, and directed her trustees to secure the same by selling a sufficient sum of stock, and afterwards disposed of the residue of the monies to arise from the sale and conversion of her personal estate.

A question was raised between the executors and the legatees of the 6,000*l.* 3*l.* per cents., whether the legacy duty on that bequest was to be paid out of that particular fund, or out of the general personal estate.

The case came before the Master of the Rolls, who was of opinion that the legacy duty was payable out of the particular fund; and the legatees appealed from that decision.

Mr. Wood and *Mr. Craig*, for the plaintiffs, in support of the decision, contended, that the terms in which the testatrix directed the payment of the legacies, free from legacy duty, were so general that all the bequests in the will would be included, and that there was no difference in this respect between the pecuniary legacies and the gifts of stock.

Mr. Cooper and *Mr. Lewis*, for the appellants, contended, that the testatrix contemplated two classes of gifts: first, of stock, and secondly, of money; that she first directed her debts, legacies, &c. to be paid, and then desired that the stock should be

appropriated or purchased out of the residue which should remain after payment of the legacies,—clearly meaning thereby those bequests which did not consist of stock. The gift of pecuniary legacies began a distinct part of the will: she gave "the several legacies following," and then directed such several legacies to be paid free from legacy duty. The pecuniary legacies were all of small amount, and there was some reason why the duty upon them should be paid out of her estate, but that reason did not apply to the gift of the larger sum of stock.

The LORD CHANCELLOR (without hearing a reply).—It is not quite certain what the testatrix meant, but she has used terms large enough to comprehend all the legacies. She has directed that they shall be paid free from legacy duty. It is incumbent on the appellants, as claiming the exclusion of these sums, to shew that she has not included them. If I cannot find that contra-distinction between bequests of money and stock drawn by the will, I am not at liberty to draw the distinction and to decide that the direction will not comprise the whole. [His Lordship stated the will.] The testatrix then bequeaths certain legacies, and then comes the expression on which the question turns: "all such several legacies as well as any hereinafter given shall be paid immediately after my decease, and free of legacy duty." It is an imperfect sentence, but to make it complete, it must be read "such legacies as are before given, as well as what are after given." It is clear that this is not confined to gifts of money legacies, because the annuity is admitted to be included, and that is to be secured by an appropriation of stock. That was not to be excluded. Why then exclude the other case of a bequest of stock? I can see nothing to distinguish the one from the other, except the small circumstance of a fresh sentence being begun with the words, "I give and bequeath to my several servants next hereinafter mentioned the several legacies following." There is another circumstance which, although not enough of itself to lead to this conclusion, would be very inconsistent with the notion that the sums of stock were to bear the legacy duty. The testatrix had clearly the subject of legacy duty before her mind. She makes a bequest of 6,000*l.* stock: that sum was to be appropriated whatever the price of the funds might be. How could that exact sum be purchased, if the legacy duty were to be paid out of it? If the 3*l.* per cents. were nearly at par, that sum might possibly be purchased with that sum of money; but if the general estate was to bear the legacy duty, that would be done whatever might be the price of the 3*l.* per cents. at the time. I do not say that that would be sufficient of itself to lead me to this decision: still, when we consider the meaning of the doubtful expression in the will, it appears to be some assistance when you find that a precise amount of stock is to be realized, with the intention that the legacy duty of all legacies should be paid out of the general estate. It is not that upon which I proceed, but upon the sentence which directs the payment of the legacy duty.

K. BRUCE, V.C. Nov. 21. } HODGSON *v.* SHAW.

Creditors' Suits—Settling Conveyance—Costs of Purchaser.

Where, under a decree in a creditors' suit, ordering that the real estates of the debtor should be sold, and that the Master should settle the conveyances in case the parties should differ, an application is made to the Master respecting a conveyance, the purchaser is bound to pay the costs of his attendance before the Master.

This was a creditors' suit for the administration of the real and personal estate of Richard Shaw (1). The cause now came on for further directions. At the same time, a petition was presented by Mr. Postlethwaite, stating the following case:—By a decree made in the cause, on the 30th of July 1831, it was ordered (among other things) that the real estates of Richard Shaw should be sold, and that the Master should settle the conveyance in case the parties differed. In pursuance of this order, the real estates were put up for sale by auction in several lots, and Mr. Bolton bought Lot 1, and the petitioner, Mr. Postlethwaite, bought Lot 4. A question afterwards arose between Mr. Bolton and Mr. Postlethwaite, as to a right of way claimed by Mr. Postlethwaite, under

(1) See 3 Law J. Rep. (N.S.) Chanc. 190.

the conditions of sale, over Lot 1; and, the parties not being able to agree, they went before the Master respecting their conveyances, and the matter was settled. The prayer of the petition was, that the petitioner might be allowed the costs of his attendance before the Master, and of his present application.

Mr. Malins, for the petitioner.

Mr. Russell, Mr. Lloyd, Mr. Rudall, and *Mr. Chapman*, for the other parties.

KNIGHT BRUCE, V.C. said, that the general rule was that, where, in a creditors' suit, under a direction that the Master should settle the conveyances in case the parties differed, an application was made to the Master respecting a conveyance, the purchaser paid the costs of his attendance, unless a special case was made. No special case was made in this case; and the petition must be dismissed, with costs.

M.R.
Feb. 18, 19, 20; April 17. } SPARLING *v.* PARKER.*

Mortmain, Statute of—Shares in Dock and Gas-Light Companies — Charitable Legacies—Abatement.

A testator directed payment of his debts, and then bequeathed certain sums of money to his executors in trust, for the benefit of certain poor persons. The testator at his death was possessed, amongst other things, of divers shares in certain gas-light, dock, and railway companies, which, by deeds or acts of parliament, were agreed or declared to be personal estate. The pure personal estate of the testator being insufficient to fully satisfy all the legacies given by his will,—Held, that the shares in the several companies were applicable to the payment of the charity legacies.

R. S. Berry, by his will, dated the 5th of October 1837, gave to three trustees, therein named, four sums of 500*l.* each, in trust within twelve calendar months after his decease, to invest the same in such manner as should seem most advantageous to them, and to distribute the interest or profit annually accruing therefrom amongst the poor, honest, and industrious people resident within certain townships mentioned in the testator's will. The testator appointed the three trustees the executors of his will. The testator, at the time of his death, was possessed of divers mortgage securities; and other parts of his personalty consisted of chattels real, or chattels otherwise connected with land, viz., shares in the Liverpool Gas-Light Company, shares in the Edinburgh and Glasgow Railway Company, and in the Edinburgh, Leith, and Newhaven Railway Company, shares in the Lancaster Gas-Light Company, and in the Harrington Dock Company. The Liverpool Gas-Light Company had been duly incorporated by act of parliament, and was empowered to purchase lands. The subscribers to the joint stock were severally to be entitled to a right and interest in the capital, in proportion to the number of shares which they respectively held in the same capital, and to a like proportional share in the profits and advantages attending the capital; and it was enacted that all shares in the undertaking, and in the interest, profits, and advantages thereof, should be deemed personal estate, and not of the nature of real property, and as such, should be transmissible accordingly. The Lancaster Gas-Light Company was a partnership, constituted by deed, dated the 20th of January 1836, whereby the stock was to be contributed in shares of 20*l.* each, and to be assignable in a particular form. The land, houses, and other things belonging to the company, were to be vested in trustees; and it was expressly provided that the shares in such land, houses, and other things, or any purchase-money for the same, should be deemed personal estate, and there was power to dissolve the company, dispose of the property, and apply the proceeds in a due manner, and divide the residue (if any) among the shareholders, according to their respective shares and interests therein. The Harrington Dock Company was also a partnership, constituted by deed, and was formed by purchasing land, and for protecting and improving the same by the erection of a sea-wall, and the formation of a canal, wharfs, and buildings, for the reception and discharge of ships. The capital of that com-

* This case was unavoidably omitted in its proper place.

pany was to be divided into two thousand shares of 100*l.* each. The company might raise money on mortgage, and also invest money on real security; and it was provided that all the property in the company as between the shareholders should always be considered as personal estate; and each shareholder was to be interested in the profits, and liable to the losses of the company, in proportion to his share; and there was to be no benefit of survivorship amongst the shareholders, but every shareholder was to have a distinct and separate right to his share, and the same was subject to the regulations of the deed, and subject to his disposition by deed or will, or in case of intestacy, to be transmissible to his personal representatives; and there was a provision contained in the deed, for the dissolution of the company, the sale of the property, and the winding up of its concerns, and for the division of any surplus amongst the shareholders. Each of these companies, and the Harrington Dock Company, was possessed of, and entitled to, real estate, as part of its capital, and each shareholder having an interest in an undivided portion of the aggregate of the joint stock or capital had some interest in the real estate, which constituted part of that aggregate stock; that is, an interest that so much of the joint stock as consisted of land should be employed with the rest of the joint stock, for the advantage of the joint concern, and an interest in the clear produce which might arise from the sale of the joint stock including the land, in case the company should be determined, and the affairs wound up and settled. The question for consideration was, whether the shares in the several companies (except the Scotch railway companies, to which it was admitted the Statute of Mortmain, 9 Geo. 2. c. 36, did not apply,) were within the Statute of Mortmain, so as to render it necessary that the charity legacies must abate to the extent of the amount to be paid out of the produce of those shares; the pure personal estate of the testator not being sufficient to satisfy the testator's debts and the legacies bequeathed by his will.

Mr. Turner and *Mr. Geldart* appeared for the plaintiffs, the trustees, who had filed the bill for the administration of the testator's estate, and contended that the shares in the several railway and gas-light companies, and in the Harrington Dock Company, were applicable to the payment of the charity legacies; that, as to the Liverpool Gas-Light Company, the right of the shareholders was clearly against the directors, after a declaration had been made by the directors of dividends, and was not against the land itself directly; that, as regarded the capital of that company, the only right the shareholder possessed in case of a dissolution was to draw out his share of the capital, and that no shareholder would be allowed to elect to take any part of the land of the company instead of his share of the funds of the company, after payment of its debts, and that the same observations applied to shares in other companies.

Mr. Purvis and *Mr. Walpole*, for Mrs. Parker, the devisee for life of the testator's residuary estate, contended that the shares in the several companies were, except for the purpose of devolution, to be considered as real estate.

Mr. R. Roupell and *Mr. Whitmarsh, jun.* for C. Sparling, who was interested in remainder in the testator's residuary estate, contended that the charities must abate, the Statute of Mortmain speaking of an interest as well as of an estate in land.

Mr. Tinney and *Mr. R. Perry*, for John Sparling, who was also interested in remainder, after C. Sparling, in the testator's residuary estate, contended that the authorities had determined that everything that savoured of land came within the Mortmain Act, and that no agreements entered into between the parties in a company not established by an act of parliament, could exclude the effect of the enactments of the Mortmain Act.

Mr. Kindersley appeared for the testator's heir-at-law.

The following authorities were cited in the course of the arguments:—

Thompson v. *Thompson*, 1 Coll. 381; s. c. 13 Law J. Rep. (N.S.) Chanc. 455.

Du Hourmelin v. *Sheldon*, 1 Beav. 79; s. c. 8 Law J. Rep. (N.S.) Chanc. 133.

Harrison v. *Harrison*, 1 Russ. & Myl. 71.

Shelford on Statute of Mortmain, 544.

March v. *Attorney General*, 5 Beav. 433; s. c. 12 Law J. Rep. (N.S.) Chanc. 31.

Bligh v. *Brent*, 2 You. & Coll. 268; s. c. 6 Law J. Rep. (N.S.) Ex. Eq. 58. *Attorney General* v. *Giles*, 5 Law J. Rep. (N.S.) Chanc. 44.

The MASTER OF THE ROLLS, after stating the facts already set forth, delivered his judgment as follows:—The question is, whether there is such an interest in land as was contemplated by the 3rd section of the act of parliament, 9 Geo. 2. c. 36. A shareholder in each of these companies, whether incorporated or not, has a right to receive the dividends payable on his shares, that is, he has a right to his just proportion of the profits arising from the employment of the joint stock, consisting partly of land; and has also a right to sell or assign his shares for value; but whilst he continues to hold his shares, he has no distinct or separate right to the land, or any part of it. He is, indeed, interested in the employment of the land, but he cannot proceed against the land directly, for anything which is due to him, or make any part of the land his own, in part satisfaction of any demand or claim he may have as a shareholder; he is not in the situation of a mortgagee, who has a legal interest in the land, which land he may absolutely make his own by process of foreclosure; nor is he in the situation of a tenant in common or a joint tenant, who may make part of the land his own; and if upon a dissolution or determination of the joint concern, he shall become an owner of any part of the land, it is only upon a new transaction, and by acquiring a new title and right as a purchaser. Upon his death nothing descends to his heir, and his legal personal representatives do not acquire any share, or any interest in the land, different from that which the deceased shareholder himself possessed; and, on the administration of the estate of a deceased shareholder, the shares which the deceased shareholder may have possessed in the joint-stock company ought, in the absence of special directions or circumstances, to be sold and converted into money, to be otherwise invested. The Courts have held, that if a man directs land to be sold, and the produce applied either by itself, or as part of a mixed fund, in payment of legacies to charity, the legacies so far as their payment is made to depend on the produce of the real estate must fail, as being plainly contrary to the intent and policy of the Mortmain Act; and marshalling is not allowed; but no case has determined that such shares as those here in question are within the meaning of the Mortmain Act; and, on the whole, I am of opinion that a shareholder in the joint-stock companies now under consideration is not in that character entitled to any such estate or interest in the land as falls within the operation of the Mortmain Act. If the companies continued, the shares are only transferable for money. If they be dissolved, the whole property is sold, and the concerns are wound up, and the shareholder only obtains his share of any surplus which there may be, after satisfying all demands of the concerns in which he is interested, by reason of his shares therein. I am of opinion, in this case, that so much of the testator's assets as consisted of shares must not be applied so as to cause an abatement of the charity legacies.

M.R. Nov. 18. } HOPKINSON *v.* ELLIS.

Will — Construction — Mixed Fund — Charity Legacies—Statute of Mortmain.

E, by his will, in the first place, directed payment of his debts out of his personal estate. The will then contained a gift of E.'s real and personal estate to trustees, upon trust, to convert the same, and apply the proceeds, first, in satisfaction of the expenses of the sale, and then in payment of his debts and divers legacies to individuals and charitable institutions, and for other the general purposes mentioned in his will;—sometimes treating his estate as real and personal estate, and at other times as personal estate:—Held, that there was no conversion out and out; and that so much of the fund as arose from real estate resulted to the heir-at-law, and so much as was derived from chattels real resulted to the next-of-kin of the testator; and that only such part of the testator's estate as consisted of pure personalty could be applied in satisfaction of the charity legacies.

It does not follow, because a testator at the commencement of his will has directed payment of his debts out of his personal

estate, that he intended to controul a subsequent direction to his executors to pay them out of a common fund of a mixed character.

Semble — *Executors, notwithstanding a clause in the will giving them a power of selection of charitable gifts, cannot apply any part of the estate to other purposes than those pointed out by the testator in his will.*

Sir John Elley, by his will, dated the 6th of April 1838, in the first place directed his just debts, and funeral and testamentary expenses, to be paid by his executors, thereinafter named, out of his personal estate, as soon as conveniently might be after his decease. He then, after giving to his housekeeper his plate, china, glass, and certain furniture, gave all his freehold messuage, near Andover, and all other his real estate, and all his household goods and furniture, &c. (save as aforesaid), together with all monies in the funds, and all and singular other his personal estate and effects whatsoever and wheresoever, to certain trustees, upon trust, to sell and convert into money all and singular his real and personal estate, in such ways and at such times as they, in their discretion, should think most advantageous; and upon further trust out of the monies to arise from such sale, to discharge all expenses of such sale, and also the current expenses of executing the trusts of the testator's will, and also his funeral and testamentary expenses, and his just debts, and to invest divers sums of money in the public funds, for the purpose of securing the payment of certain annuities therein mentioned; and the testator directed that such sums, as the annuities fell in, should form part of the testator's residuary *personal* estate. The testator then, after bequeathing various pecuniary legacies, and declaring that the same should be paid free of legacy duty out of his personal estate, directed, that after the whole of the said annuities and legacies should have been paid, satisfied, or provided for, the trustees should, without prejudice to the preceding gifts, pay to the treasurers of several charitable institutions in the will named, various sums of money, free of legacy duty, out of his residuary *personal* estate. And the testator directed that the several legacies to the said charities should, if possible, be paid or retained by his trustees within six calendar months next after his decease; but if they could not, within eighteen calendar months next after his decease, satisfactorily identify the said charities, or any of them, or if it should be proved to their satisfaction, or they should discover, upon inquiry, that any of the said charitable institutions had been dissolved, divided, or discontinued, then the legacy intended by his will to be paid to the treasurer of that institution should be paid to the treasurer for the time being of any other charitable institution which his executors should, in their discretion, fix upon for the purposes and use of such institution. And lastly, the trustees were directed to pay and dispose of so much of the residue and remainder of the testator's real and personal estate, or the proceeds thereof, after answering, paying, and fully providing for the debts, legacies, annuities and bequests, and all expenses attending the execution of the trusts of his will, as should not exceed the sum of 2,000*l.* unto Jane Carter, therein mentioned, her executors, administrators, or assigns, for her or their own absolute use and benefit; and should there be any surplus of such residue beyond the sum of 2,000*l.* sterling, then the trustees were directed to pay the whole of such surplus into the hands of such treasurer or treasurers for the time being of any needful charitable institutions which his trustees might in their discretion select. One of the legacies bequeathed by the testator's will was as follows :—"To Isabella E. E. Cooksley 200*l.*, on her attaining the age of twenty-one years; but if she should die under that age, then to pay the same legacy to her father (if living) immediately after her decease; but if he should not survive his said daughter, then the said legacy to sink into and form part of the residue of his *personal* estate."

The testator died on the 23rd of January 1839, seised in fee simple of certain real estates, and possessed of a considerable personal estate, part of which was personalty savouring of realty.

A suit having been instituted by the trustees for the administration of the testator's estate, a decree was made on the 1st of March 1842, directing various inquiries to be made and accounts to be taken by the Master, pursuant to which the Master made his report, dated the 27th of March 1846, and

found that part of the testator's property consisted of personal estate, arising from the sale of real estate, of personal estate savouring of realty, and of pure personal estate of considerable amount.

Mr. Turner and *Mr. Willcock* appeared for the plaintiffs.

Mr. Kindersley and *Mr. Teed*, for John Ellis, the heir-at-law and one of the next-of-kin of the testator, contended that the debts of the testator must be paid out of the testator's personal estate, in the first instance, and by the real estate, or the proceeds of the real estate, only in aid of the personalty, in case the personal estate should prove insufficient, the testator having nowhere in his will shewn an intention to vary the well-known rule of law, that the real estate was not rendered more liable because the testator had directed payment of his debts out of a mixed fund.

Smith v. *Claxton*, 4 Madd. 484, and
Arnold v. *Chapman*, 1 Ves. sen. 110.
were cited on behalf of the heir-at-law.

Mr. Rolt, *Mr. Roupell*, and *Mr. Renshaw*, for the other next-of-kin of the testator, contended that, from the terms used in the gift of the legacy of 200*l.* to Isabella Cookaley, and the expressions found in other parts of the will, it was the intention of the testator that there should be a conversion of his property out and out, and to all intents and purposes, by which the heir-at-law would be deprived of his exclusive right to the proceeds of the real estates; and that the gift of the residuary estate in favour of the charities wholly failed as to so much thereof as was derived from the sale of the testator's real estate, and from the personal estate savouring of realty. The following authorities were cited on behalf of the next of kin—

Byam v. *Munton*, 1 Russ. & Myl. 503; s. c. 8 Law J. Rep. Chanc. 156.
Phillips v. *Phillips*, 1 Myl. & K. 649; s. c. 1 Law J. Rep. (N.S.) Chanc. 214.
Countess of Bristol v. *Hungerford*, 2 Vern. 645.
Rogers v. *Rogers*, 3 P. Wms. 193.
Sturge v. *Dimsdale*, 6 Beav. 462; s. c. 15 Law J. Rep. (N.S.) Chanc. 124.
Philanthropic Society v. *Kemp*, 4 Beav. 581; s. c. 11 Law J. Rep. (N.S.) Chanc. 360.
Pritchard v. *Arbouin*, 3 Russ. 456; s. c. 5 Law J. Rep. Chanc. 175.
Mann v. *Burlingham*, 1 Keen, 235.
Giblett v. *Hobson*, 3 Myl. & K. 517; s. c. 4 Law J. Rep. (N.S.) Chanc. 41.

Mr. Wray, for the Attorney General, observed that a discretion was given to the executors by the testator to select certain charitable objects, and that he conceived the same was not necessarily void, and referred to the case of *Smith* v. *Claxton*, decided by Sir J. Leach, V.C. as laying down the rule of law as regarded the resulting trust in cases like the present.

Mr. L. Lowndes appeared on behalf of the rector, mayor, aldermen, and burgesses of New Windsor, legatees of 1,000*l.* named in the testator's will.

The MASTER OF THE ROLLS.—This is one of those cases where the object is to apply the law as it is laid down in the Statute of Mortmain, and not in respect of the particular matter which is now under consideration to consider what is meant by the will, any further than it appears to be the intention of the testator to deal with his estate in a particular manner. This testator intended to dispose of the whole of his estate; and so careful was he about that, that he disposed of that which was to be a residue after the particular purposes which he had in view were answered; it is, therefore, clear that he had no object or intention beyond that which is expressed in the will. He intended to provide for the payment of his debts, for the payment of legacies and annuities to different individuals, for the payment of particular charges, and to give authority to his trustees to apply any surplus which remained after answering those purposes to charities, to be selected by themselves. That was the way in which it was to be done. He commences his will by directing that his debts, and so on, are to be paid out of his personal estate; and there is a general direction that that was to be done. Then he proceeds to direct the means by which those objects are to be carried into effect—the whole of his objects, not the objects other than and except the payment of his debts, but the whole of the objects he had in view by the will; and for that purpose he gives, in the largest terms

that could possibly be found, the whole of his estate, both real and personal, to his trustees and executors, upon the trusts and to and for the several intents and purposes thereinafter expressed and declared concerning the same. Now then for those objects and those purposes: and as the first means of effecting those objects and purposes, he directs them to sell and convert into money the whole of his real and personal estate; then he directs the application of the money to arise from the sale, first in payment of the expenses of the sale; next in payment of the general expenses of executing the trusts of his will. Then he directs them to be paid and applied in payment of his just debts, and, in particular, the sum of 3,000*l.* due and owing by him on mortgage; and in the next place to lay out and invest sums which were necessary in securing annuities, and so on, to the general intent which I have mentioned before, using, in the course of his will, expressions which shew sometimes that he treated it as real and personal estate, and upon one or two occasions shewing he considered that which was real and personal estate to be personal estate; for after directing plainly to be taken out of the common fund of his real and personal estate certain sums which might be invested for security of the annuities, he says, when the annuities drop they are to sink into—what? Not his real and personal estate, but into his residuary estate. I think it is very manifest, under these circumstances, that you cannot come to any particular conclusion on the notion that he has, in the first part of his will, directed his debts, and so on, to be paid out of his personal estate; because, when you come to look at his *modus operandi*, and see what he was about to do, and how it was to be done, you find he treats it as his common personal estate. I know these things are always of difficult construction, and there are plausible reasons to be offered on the one side and the other; but it would be refining a great deal too much to say, that that distinct direction, which is a direction to constitute one common fund, and the direction to pay out of that one common fund is to be altered by the common direction at the beginning of this will for the payment of his debts out of his personal estate.

I think, therefore, I must conside as a mixed fund; being a mixed the application of it is as clear a thing can be. You cannot apply an of it which arises from the real est from chattels real to charity; therefo much of the charities which are direc be paid out of the common fund, as according to the testator's meaning had to be supplied out of realty or chattels real or money connected with will fail; that is the extent to whic fail. For whose profit, or for whose b is this? Mr. Wray has stated the with the most perfect correctness: you find the purposes for which the te has desired this to be done have to an what extent failed, you are to conside is the resulting trust. The resulting is different in the different cases; so the property consists of pure perso and is not disposed of, which is a case does not arise here, it goes to the ne kin. So far as it consists of chattel which is the case which arises here, it also, to the next-of-kin; but so fa arises from the sale of the real estate, has been sold for carrying into effe trusts of the will, then it goes to the Now, it is made a question in this whether that is the mode in which the plus is to be disposed of, because it i that here there is to be found a plain i tion to convert it out and out for all poses whatsoever; and if it was con out and out for all purposes whatsoe that is, for all purposes which would or in any way belong to personal est the hands of the testator—then, in there would be something in the arg which has been used. But it is not so a it may be converted out and out into sonal estate, to all intents and purpos one sense. But it could not, even i hands of the donee, in the hands o legatee who takes it by the direction c testator, be considered as otherwise personal estate; and he takes it as per estate, as was pointed out in the case re to before Sir John Leach. But here clear that the testator had no purpose those which are expressed in his will, purpose going beyond it. He conv this into money in order that it mig conveniently applied in the manner dir

by his will, and not for any other purpose whatever; and, therefore, we are only to consider what is the nature of the resulting trust,—which depends on the nature of the property, whether it is to go to the heir or the next-of-kin. I cannot say I have any reason to suppose that the next-of-kin have a right to any portion of the fund which arises from the real estate. The next-of-kin must take their share from that portion which arises from the mixed personalty, but not from the real estate. I should have been very willing to hear any case which there may be on the first point, if I had any doubt about it.

The MASTER OF THE ROLLS afterwards observed, that, in the case before the Court, it would be advisable to follow the form of the decree made in the case of *The Attorney General* v. *Winchelsea*, and set forth in *Seton on Decrees*, p. 130, which everybody understood; that with reference to the point that had been suggested about the executors having a discretion to apply a part of the fund to other purposes, his Lordship thought the rule would not allow him to say they could do it, and that they must not have conferred on them the power of making an application different from that which the testator intended. The Attorney General not objecting, and all other parties consenting, the costs were ordered to be paid as between solicitor and client out of the mixed fund.

V.C. Nov. 9. L.C. Dec. 9, 11. } FINDEN *v.* STEPHENS.

Receiver—Recommendation in Will.

A testator directed, that, as his estates would require more management than his trustees could bestow upon it, his wish and desire was that the plaintiff should be appointed the manager and receiver of the estates:—Held, (reversing the decision of the Court below) that this direction was not imperative, and the trustees were not bound to employ the plaintiff as manager and receiver.

The testator, James Bushnell, devised and bequeathed certain property to trustees, upon trust to pay legacies, and an annuity to his wife during her life; and then in trust for four nieces of his wife and their issue. He authorized the trustees to grant leases, and also to sell with the consent of the nieces; and he then directed as follows:—"And inasmuch as my estate and property will require more management than I can expect of my trustees personally to bestow, it is my wish and desire that Thomas Finden, architect and surveyor, in whose judgment and integrity I place great confidence, be appointed for all purposes, for which they or he, my trustees or trustee, may have occasion for an agent, receiver, or manager of all or any of my estates and property;" and in case he should die, or desire not to act, then that the nieces, or the survivor of them, should appoint some other person. And the testator appointed Charles Stephens and William Bland executors, and Frances Welch, one of the nieces, executrix of his said will, and did thereby declare that his trustees and executors and executrix, therein named and appointed, and every other trustee to be appointed as aforesaid, and also the said T. Finden, and the person or persons to succeed him, should only be answerable for such property, rents, profits, dividends and money respectively, as they respectively should actually possess and receive, and each only for the property and monies which he and she might possess and receive, and that they respectively should always be allowed and receive and be paid their costs and expenses in the execution and performance of the testator's will, and the trusts thereof.

The bill charged that the plaintiff had applied to the trustees to be appointed a receiver of the testator's estates; but that they pretended that the testator did not intend to appoint, and had not appointed the plaintiff to be the agent, receiver, or manager of his estates, but that the testator intended to leave the appointment of such receiver or manager of his estates to the option and discretion of his executors. The bill further charged that the said defendants threatened and intended to appoint or employ some other person to be the agent, receiver, or manager of the said testator's estates and property, or some part or parts thereof. The bill prayed that it might be declared

that the plaintiff was entitled to be appointed the agent and receiver and manager of all the estates and property of the testator, in respect of which the trustees might have occasion for a receiver or manager, and that the plaintiff might be permitted to act as such receiver.

The case came on upon demurrer.

Mr. Stuart and *Mr. Bazalgette*, for the demurrer, contended that the clause in the testator's will respecting the appointment of a receiver was merely recommendatory, and not imperative: the plaintiff was only to be appointed receiver in case the trustees had occasion for the services of such a person; there was nothing here that could enable the Court to say that the trustees were compellable to appoint the plaintiff to be such receiver or manager, and it would be most inconvenient if the trustees were to be subject to the obligation of appointing a person who was in any manner objectionable to them. The cases of—

Shaw v. *Lawless*, 5 Cl. & Fin. 129.
Friswell v. *Moore*, cited in 5 Cl. & Fin. 142.
Williams v. *Corbet*, 8 Sim. 349; s. c. 6 Law J. Rep. (N.S.) Chanc. 182.
Hibbert v. *Hibbert*, 3 Mer. 681.

were cited as authorities.

Mr. Bethell and *Mr. Moxon*, in support of the bill, contended, that the direction in the will was not discretionary on the part of the trustees, but imperative; and that Mr. Finden was entitled to be appointed the receiver and manager of the estates. The following case was cited—

Foley v. *Parry*, 5 Sim. 138; s. c. 2 Myl. & K. 138.

Mr. Stuart, in reply.

The VICE CHANCELLOR.—I am of opinion that the demurrer must be overruled, because it appears to me to be an extremely plain case; and I think that the decision of the House of Lords, in the case of *Shaw* v. *Lawless*, does not at all affect the present case. The House of Lords seems to me to have very laboriously considered what was the true construction of the will in that case; and it really comes to this: there were clauses in the will which seemed to conflict with each other, and therefore the House of Lords, as a court of justice, was bound consider what was the true meaning to elicited from the conflicting clauses; there was no decision that, in the first stance, such effect might not be given to will, as apparently, on the reasoning, wo have been attributed to it but for w followed, namely, the conflicting interest Shaw and other persons. Now in this ca as I understand it, the testator has in first instance devised the whole legal est to certain persons as trustees; and then says, "And inasmuch as my estate property will require more managem than I can expect of my trustees persons to bestow, it is my wish and desire that hereinbefore named Thomas Finden, Upper John Street, Fitzroy Square, arc tect and surveyor, in whose judgment integrity I place great confidence, be pointed for all purposes for which they he, my trustees and trustee, may have oc sion for an agent, receiver, or manager all or any of my estates and propert And then he goes on further to say, " in case the said T. Finden shall die, or de not to act in the said office, then it sl be lawful for my trustees to appoint so other person;" and then there is this fi clause, "and I do hereby declare that trustees, executors, and executrix he named and appointed, and every other t tee to be appointed as aforesaid, and the said T. Finden, and the person or sons appointed to succeed him, shall be answerable for such property, profits, dividends, and money respec as they respectively shall actually and receive, and each only for the p and monies which he and she may and receive; and for his and her ov acts, neglects and defaults only, further or otherwise; and, also, t respectively shall always be allc receive and be paid their costs penses in and about the exec performance of this my will. trusts thereof." Now it appe that here is, in express terms tion, that if the trustees ha for any purpose for an age and manager, in that case, shall be the agent, receiver, a and how a difficulty or doubt as to the time when the ri

receiver, agent, and manager arises, or how long it shall continue, appears to me a most singular thing, because it is the act of the trustees themselves (which must be known to themselves) that determines, in the first instance, whether they, the trustees, have occasion for a receiver, agent, and manager, and if so, then for how long. In case, and when, and as long as they have occasion for an agent, receiver, or manager, Mr. Finden is to be the agent, receiver, or manager. The words used are words perfectly well known in the law; and it appears, also, that the testator did intend that there should be an agent, receiver, or manager, who should be entitled to costs and expenses, and so on, in the manner he has stated in his will, However, the question now before me is, not in what manner he shall be recompensed, but whether he is entitled to file a bill against the trustees, he alleging the fact on the bill, and which, therefore, the trustees admit to be the fact, namely, "That the said defendants threaten and intend to appoint or employ some other person to be the agent, receiver, or manager of the said testator's estates and property, or some part or parts thereof." If that is the case, it is their own act which has given rise to the right of the plaintiff to file a bill, and to be appointed the agent, receiver, or manager, to the extent to which the trustees intend to appoint one, for they could not intend to appoint an agent, receiver, or manager, without having occasion to do so; and it really appears to me that it is quite consistent with all the cases which have been cited, and particularly with the case of *Shaw* v. *Lawless*, that the plaintiff should sustain his bill; my opinion is, that it is quite free from the difficulty of vagueness and indefiniteness, because the act of the trustees determines the origin and the continuance of the plaintiff's right.

The defendants appealed from this decision, and the case was argued before the Lord Chancellor by the same counsel on the 9th of December.

Dec. 11, 1846.—The LORD CHANCELLOR.—The great caution which I think it my duty to exercise in all cases in which I have the misfortune to differ from the opinion of other Judges of the Court, induced me, notwithstanding the strong opinion I entertained at the hearing of this case, to abstain from acting on it till I had an opportunity of examining the case of *Shaw* v. *Lawless*, and the judgment of the Vice Chancellor in this case. The result has been a confirmation of my first impression. I think, indeed, that the present falls within all the principles of *Shaw* v. *Lawless*, and is a much stronger case against the claim. In *Shaw* v. *Lawless* the question was stated to be, whether the words used amounted to a trust, or only to an expression of opinion and advice. The provisions of the will were examined, in order to ascertain which of those was to be considered as the intention of the testator; and it was shewn that, to consider the words as a trust, would be inconsistent with other provisions of the will; and, therefore, the construction was adopted of considering the words only as words of recommendation or advice. Nearly all the observations made in pursuing the inquiry in that case apply to the present. The testator gives his property to trustees, who, until the death of the survivor of the wife and his nieces, were to act in the management of the estate, with a power of leasing and selling with the consent, in some cases, of the *cestuis que trust*, to secure the due performance of those duties. Is it consistent with those purposes that he should give to the plaintiff an irrevocable office of agent, receiver, and manager, if the nomination of the plaintiff amounted to a trust, or gave to him the character of a *cestui que trust* to the amount of a per-centage on his receipts, in respect of which he would be entitled to that interference and controul which belongs to all *cestuis que trust?* In *Shaw* v. *Lawless* it was asked whether the plaintiff could have been intended to have a right of interfering in the trust to invest the money in hand; so, in this case, it may be asked whether the plaintiff could be intended to interfere with the power of the trustees, and the wishes of the widow and nieces, in exercising the power of sale. It would be useless to pursue this further, for there is scarcely a ground of the decision in *Shaw* v. *Lawless* which does not apply to this case; but there are many objections to the plaintiff's claims in this case which did not exist in that of *Shaw* v. *Lawless*. Those appointments are admitted to be optional

been filed at that time. It would then have appeared to the Court as a fact, that there was not enough of the rents and dividends to pay the annuity. In that event, the words are perfectly clear; because the testator says, "In case there should not be sufficient to pay and satisfy the annuity of 300*l.* per annum, then upon trust to sell and dispose of *all* and every part of my said real and personal estate." I think the trust arose immediately, as soon as it was ascertained there was not enough to pay the annuity. The subsequent clause in the will amounted to this, that whether there was a sale or not, the trustees were to be at liberty to purchase an annuity, and for that purpose to dispose of the corpus of the estate. That is different from what is contemplated in the first part of the will. It is to be observed, that when the testator speaks of the shares of his sisters, he says, "If either of them should depart this life before their share should become *due or payable*." This expression confirms the view I have taken of the will, for no one ever heard of a real estate becoming due or payable; and, consequently, the testator must have been thinking of personal estate.

K. BRUCE, V.C. Nov. 12, 19. } ESDAILE *v.* MOLINEUX.

Exceptions—Time for Excepting—16th Order of May 1845*—Jurisdiction of Vice Chancellors.*

On the 20th of May the defendant filed plea as to part of the bill, and an answer as to the remainder. On the 29th of June the plea was, after argument, overruled. On the 18th of July the plaintiff took exceptions to the answer for insufficiency, and on the 29th, obtained an order of course, at the Rolls, for referring them to the Master. A motion by the defendant to take the exceptions off the file, on the ground that they were not filed within six weeks after the answer was filed, and to discharge the order of the Master of the Rolls, was refused with costs.

A Vice Chancellor has no power to discharge an order of course made at the Rolls.

Where a plea and answer are filed to a bill, and the plea is argued and overruled, the time limited by the 16th Order of May 1845, *article* 22, *for taking exceptions for insufficiency, runs from the overruling of the plea, and not from the time of filing the plea and answer.*

Semble—*Where, under an order of course, made at the Rolls, exceptions for insufficiency are referred to the Master, a Vice Chancellor has the power of ordering the exceptions to be taken off the file.*

The plaintiff in this case took exceptions to the defendant's answer to the original bill for insufficiency; and the exceptions were allowed. The plaintiff then amended his bill.

On the 20th of May 1845 the defendant filed a plea as to a part of the amended bill, and an answer as to the remainder.

On the 29th of June the plea was, after argument, overruled.

On the 18th of July, the plaintiff filed exceptions to the defendant's answer to the amended bill for insufficiency, and gave notice of them to the defendant on the same day.

On the 29th of July an order of course was obtained by the plaintiff at the Rolls, for referring the exceptions to the Master. The order was served on the 30th, and a copy of the exceptions was left with the Master on the 1st of August.

The defendant now moved that the exceptions filed by the plaintiff to the answer of the defendant to the amended bill might be taken off the file for irregularity; and that the order of the Master of the Rolls of the 29th of July might be discharged.

The 16th Order of May 1845, article 22 (1), is as follows: "After the filing of a defendant's answer, the plaintiff has six weeks within which he may file exceptions thereto, for insufficiency. If he does not file exceptions within six weeks, such answer, on the expiration of the six weeks, is to be deemed sufficient."

Mr. Wigram and *Mr. Bird*, for the motion. —By the terms of the 16th Order of May, 1845, if the plaintiff does not file exceptions for insufficiency within six weeks after the filing of the answer, the answer is to be deemed sufficient. The answer here, having been filed on the 20th of May, and the ex-

(1) Ord. Can. 277; s. c. 14 Law J. Rep. (N.S.) Chanc. 285.

ceptions not having been filed until the 18th of July, more than six weeks after the filing of the answer, the exceptions are irregular. The order comprehends the case of plea and answer being filed, and is imperative.

Mr. Anderdon and *Mr. Rogers*, for the plaintiff, were not called upon.

KNIGHT BRUCE, V.C.—The statute (2), under which I am sitting, says, "Provided always, that no such Vice Chancellor shall have power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing made or done by the Master of the Rolls." No evidence has been adduced to shew that the law thus plainly declared by the statute has been repealed or altered. The burden lies upon those who assert that it is, to shew it. This they have not done. I am asked to do that which is plainly unwarrantable and illegal. I decline to make any order on that part of the motion which seeks to discharge the order of the Master of the Rolls.

As to the other part of the motion,—namely, that which relates to taking the exceptions off the file, I doubt whether, assuming them to be irregular, I ought to order them to be taken off the file, as the order of the Rolls is one of reference, and they are now in the Master's hands, who has them in his controul.

The other point is, whether they are irregular. I think that they are not. Either the case of a plea and answer is not within the order—is a *casus omissus*—or, according to the true construction of the order, the six weeks begin to run only from the time of the overruling the plea. I decline to say to which my mind inclines: either view is fatal to the present application. I shall request Mr. Berry to put to some of the other Judges of the court one question as to the construction of the order; and another as to the practice on which I doubt, but which may be immaterial.

The case being mentioned on a subsequent day, his Honour refused the motion with costs, intimating that the opinion of some of the other Judges had been ascertained by Mr. Berry.

(2) 5 Vict. c. 5. s. 22.

The following were the questions submitted to the Master of the Rolls and Wigram, V.C., and the answers given to them.

Question 1. — Plea and answer filed. Plea overruled. Exceptions for insufficiency. Exceptions referred by order of course of the Master of the Rolls. Is it regular to move before a Vice Chancellor to take the exceptions off the file?

Answer.—Master of the Rolls.—Yes.—Wigram, V.C. would make the order.

Question 2nd.—Order 16, of 8th of May 1845. Rule 22nd.—Does the time limited by this order for filing exceptions, run from the filing of the plea and answer, or from the day on which the plea was argued and overruled, or is the case a *casus omissus?*

Answer.—Master of the Rolls and Vice Chancellor Wigram.—From the overruling of the plea.

V.C. Nov. 25. } CLARKE *v.* THE MAYOR, &c. OF DERBY.

Amendment—Negligence of Solicitor.

Upon motion for further time to amend, on account of the plaintiff having been obliged to dismiss his solicitor for negligence and misconduct, and the new solicitor not having had time to investigate the proceedings in the suit, it was held, that the plaintiff was not entitled to relief, although he might have his remedy by action against the solicitor.

This was a motion on behalf of the plaintiffs, that the time for amending their bill might be extended to the last day of Hilary term, 1847. The bill was filed in February 1846, against the corporation of Derby, for restitution of certain rights of common, which had existed during a very long period. An answer was put in on the 7th of May, and exceptions were taken to that answer. The exceptions were overruled, and an order was made by the Master upon an arrangement between the parties, that the plaintiff should have leave till the 25th of November to amend his bill. The present motion was made upon affidavits, which stated that the solicitor who had originally conducted this suit had been guilty of great negligence and delay, in consequence of

which the plaintiffs had been obliged to appoint another solicitor; that the present solicitor was appointed by an order of the Court, on the 17th of November, since which period it had been found impossible for him to get up the case sufficiently to go on with the proceedings; that it was necessary to examine a vast number of deeds and documents down from the reign of Queen Elizabeth; that this would occupy a considerable time, and that the application was not made for the purpose of delay.

Mr. Stuart and *Mr. Toller*, in support of the motion, said, it was usual, in asking for further time to amend, to shew that no negligence or delay had occurred; but, here, on the contrary, the ground of application was the great negligence and delay of the plaintiffs' solicitor, an officer of the court; that through his neglect the plaintiffs had been unable to fulfil the terms of the order; and that manifest injustice would be done to the plaintiffs, if by reason of this conduct they were precluded from having further time to amend.

Mr. Bethell, Mr. J. Parker, and *Mr. Shadwell* appeared for the defendants.

The Vice Chancellor (without hearing the counsel for the defence).—The negligence of the first solicitor was that of the plaintiffs; and if they suffer from it, they have a remedy against him by action for damages, for not performing his duties. I find this fact, that the order referred to, made on the 23rd of July, was made by arrangement; it was agreed between the parties that a specified time should be allowed; and then there was an arrangement about costs. Under these circumstances, I cannot give the plaintiffs relief.

Motion refused, with costs.

K. Bruce, V.C. Nov. 26. } WROUGHTON *v.* COLQUHOUN.

Legacy—Construction—Annuity.

The will of a testator was in part as follows: "All my goods and chattels to be converted into money. I bequeath the sum of 260l. a year to Mrs. C. C, my housekeeper, during the term of her life. And the remaining interest of my money I bequeath to R. W.; in the event of his demise to S. W," &c.: — Held, that the annuitant had a charge in respect of her annuity on the capital of the residuary estate, and not merely on the income.

The will of Colonel Williamson, the testator in this cause, dated August 3, 1837, with the exception of a formal commencement, was as follows:—"After the payment of my funeral and of all other just expenses, I bequeath and devise my property as follows: — All my goods and chattels to be sold to the best advantage and converted into money. I bequeath the sum of 260*l.* sterling per annum to Mrs. Charlotte Clark, alias Miss Charlotte Coombs, my housekeeper during my residence in Upper George Street, No. 22, Bryanstone Square, London, near the Edgeware Road, and exactly opposite a coach-house, which is on the opposite side of the Street, during the term of her life. And the remaining interest of my money I bequeath to Capt. Robert Wroughton; or, in the event of his demise, to Mrs. Sophia Wroughton, his wife; and, in the event of the death of one of these parties, the principal to go to their children; or, in the event of their having no children, to some charitable institution, as my executors may select." The testator then appointed Mr. Gideon Colquhoun, sen., Gideon Colquhoun, jun., and Mr. Jackson his executors, and gave a legacy of 1,000*l.* to Mr. Colquhoun, jun.

The suit was instituted for the administration of the estate of the testator.

At the hearing of the cause, a question was, with the consent of all parties, submitted to the Court, whether, in the event of the interest of the testator's residuary estate being insufficient to keep down the annuity, the annuitant was entitled to have the deficiency raised out of the corpus.

Mr. Cooper, Mr. Russell, Mr. Wigram, Mr. Toller, Mr. Malins, Mr. Stevens, Mr. Walford, Mr. Briggs and *Mr. Bilton*, for the different parties.

The following cases were cited:—

Baines v. *Dixon*, 1 Ves. sen. 41.
Kendall v. *Russell*, 3 Sim. 424; s. c. 8 Law J. Rep. Chanc. 108.

Attorney General v. *Poulden*, 3 Hare, 555.
Philipps v. *Philipps*, 8 Beav. 193.
Foster v. *Smith*, 2 You. & Col. C.C. 193; s.c. on appeal, 1 Phill. 629; s.c. 15 Law J. Rep. (N.S.) Chanc. 183.

KNIGHT BRUCE, V.C.—The decision of Lord Lyndhurst in the case of *Foster* v. *Smith* upon the appeal from my own judgment, proceeded upon a different will from the present. But, if it had appeared to me that his decision had proceeded upon a principle involving a decision against this will, I should not hesitate to follow his opinion in preference to my own; although I must say, with great deference and respect for his Lordship's decision, that my own opinion pronounced in *Foster* v. *Smith* remains as it was. I need not say, that his Lordship's conclusion is more likely to be correct than my own. I think, however, that the decision of Lord Lyndhurst in *Foster* v. *Smith* did not proceed upon any principle, an adherence to which requires an adjudication in the present case against the annuitant. It seems to be agreed, in the first place, that to restrict the annuitant to the income during her life would involve the postponement to a certain extent of the bequest to her to the other legatees; for which I do not see any sufficient ground. In the next place, the annuity is given to the annuitant by words so clear and distinct, that, if nothing were added to them, it is plain that she would have a charge upon the capital of the estate as well as upon the income. The intention, so very clearly expressed, ought, in order to be displaced, to be met by an indication of a different intention equally unambiguous. I am of opinion, that the language from which a different intention is sought to be implied, does not unambiguously, if at all, exhibit that intention. In my opinion, the just interpretation of the will requires that the annuitant shall be held to have a charge in respect of her annuity upon the capital of the estate, and not merely upon the income. It must, therefore, be declared that the Court, at the request of all parties to the record, puts a construction on the will at this stage of the cause, and declares this to be the construction of it.

K. BRUCE, V.C. Nov. 21; Dec. 14. — *Ex parte* HOLLICK, *in re* ELY, BRANDON AND PETERBOROUGH RAILWAY ACT.

Railway Acts—Tenant for Life—Investment of Purchase-money—Affidavit.

Where a tenant for life of lands sold by him, under a railway act, to the company, presents a petition for the investment of the purchase-money and payment of the dividends, the usual affidavit that he believes his title to be good, and that he is not aware of any other claims, will not be dispensed with, although the petitioner is aged and infirm, and although the company may have contracted with him, accepted his title, and consented to the prayer of the petition.

This was a petition, presented by the tenant for life of certain lands taken by the Eastern Counties Railway Company, for the investment of the purchase-money, and the payment of the dividends.

By the 7 & 8 Vict. c. lxii. (1), (being an act to enable the Eastern Counties Railway Company to make a railway to Ely, Brandon, and Peterborough), s. 13, tenants for life were enabled to contract for the sale of lands to the company. By the 25th and 26th sections (2) it was enacted, that in case of such sales, the purchase-money should be paid into court to the credit of "*Ex parte* the Eastern Counties Railway Company," and that the same might be invested in consols, and the dividends paid to the party who would, for the time being, have been entitled to the rents and profits of the lands, upon an order to be made for that purpose on the petition of such party. By the 29th and 30th sections (3) it was enacted, that if the owners of lands could not be found, or could not make a good title, &c., the purchase-money should be paid into court to the credit of the parties interested in such lands (describing them,

(1) This act was passed before the Lands Clauses Consolidation Act, 8 Vict. c. 18; but the clauses mentioned in the report are nearly identical with clauses contained in the Lands Clauses Consolidation Act. Section 13th agrees with section 7th of 8 Vict. c. 18.

(2) The sections 25. and 26. agree with sections 69. and 70. of 8 Viot. c. 18.

(3) The sections 29. and 30. agree with sections 76. and 78. of 8 Viet. c. 18.

so far as the company could do), subject to the order and disposition of the said court; and that, upon the application by petition of the party making claim to the money so deposited as last aforesaid, the Court might order the investment and payment of dividends, or the distribution thereof according to the respective interests of the parties making claim to such money or lands.

Anne Hollick, the petitioner, as tenant for life of certain lands, required for the purposes of the railway, contracted with the company for the sale to them of such lands for 920*l.* The company approved of the title, and the money was paid into court under the 25th section, to the credit of "*Ex parte* the Eastern Counties Railway Company." The petitioner then, under the 30th section, presented a petition for the investment of the money, and the payment to her of the dividends for her life. Upon this petition an order was made, with the consent of the company, according to the prayer. No evidence was produced at the hearing, as to the title of the petitioner.

Before drawing up the order the registrar required that an affidavit should be made by the petitioner as to her belief of the goodness of her title, and referred to a notice put up in the office, which was as follows:—

> "Petitions under acts for sale of property. Exchequer order, 4th July 1828. Letter from the Lord Chancellor to the senior Registrar, 12th of February 1842.

"In all petitions under acts of parliament for sale of property for public purposes, when the purchase-money is directed by the act to be paid into court, the petitioners claiming to be entitled to the money so paid in must, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person to the sum of £ in the petition presented by them in this matter mentioned, or any part thereof."

It was desired by the solicitor, acting for the petitioner, that the making of this affidavit should be dispensed with, in consequence of the age and infirmities of the petitioner; and the petition was for this purpose mentioned to the Court.

Mr. Archibald Smith, for the petitioner, now applied to the Court for a direction that the registrar might draw up the order without any affidavit from the petitioner. He contended, that the order in the office did not apply to cases where the application was made by the person with whom the company had contracted, and where the company had approved of the title, and accepted it at their own risk. The order in the registrar's office is referred to in *In re* Fleet Market Improvement Act, *Ex parte Shears* (4), (July 4th, 1828). In that case the Lord Chief Baron laid it down, that in all petitions for the payment of money out of court, he should require an affidavit from the parties, verifying the title shortly, and also stating that to the best of the knowledge and belief of the deponents no other person had any title to or claimed any interest in the estate.

KNIGHT BRUCE, V.C. declined to give any direction to the registrar to dispense with the affidavit required in the office.

K. BRUCE, V.C. Dec. 4. } *Ex parte* YATES.

Trust—Appointment of New Trustees—1 Will. 4. c. 60.—Service of Petition—Infants.

A petition presented under the 1 *Will.* 4. *c.* 60. *s.* 22, *for the appointment of new trustees of trust property, in which adults and infants are interested, ought to be served on the infants as well as on the adults.*

A testator bequeathed all the residue of his estate to J. Webb, W. L. Yates and Henry Yates, as trustees, upon trust, as to seven tenth parts thereof for seven of his children for their lives, and, after their deaths, for their children; and as to the other three tenths in trust for three of his children absolutely.

One of the trustees having died, and another having gone to Australia, a petition was presented, under the 22nd section of 1 Will. 4. c. 60, by some of the parties interested in the residue, for the appointment of new trustees, in the place of the one

(4) 2 You. & Jer. 493.

who had died, and the other who had gone abroad, and a transfer of the trust property; and the usual reference was made, on the petition, to the Master.

At the time the petition was presented, some of the testator's grandchildren, who were interested in the residue, were infants.

The Master, by his report, after finding the facts mentioned in the petition, stated, that two persons named in his report were proper persons to be the new trustees.

The petition now came on again upon this report.

Mr. Little appeared for the petition.

It appeared that the adults interested in the property only had been served, and that there had been no service on the infants.

K. Bruce, V.C. directed that the petition might stand over, that the practice on this point might be inquired into.

Mr. Little afterwards stated, that he had not been able to find any authority on the point; but he contended, that service on the infants was unnecessary.

K. Bruce, V.C. said, he had taken the opinion of the Vice Chancellor of England and Vice Chancellor Wigram on the point, and that they agreed with him that service on all parties was necessary. In this case, therefore, the process, analogous to service in respect to infants, must be adopted with respect to the infants interested in the trust property.

M. R.
Dec. 14, 17, 23.

COLMAN *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

Railway Company—Power to guarantee or engage in other Undertakings—Pleading—Interest—Parties.

The managing body of a railway company incorporated by act of parliament are not entitled to employ the funds of the company in, or to guarantee the payment of a dividend, or the re-payment of capital to other parties who engage in undertakings which are not part of, or directly connected with, the works which are authorized by the act of parliament; and that, although they may increase the traffic of the railway, and although a majority of the shareholders in the railway company may approve of such application of their funds; and although the object may not be against public policy.

Where the directors of a railway company had proposed to guarantee the parties who should form a joint-stock steam-packet company, to run vessels from a port to which the railway would convey passengers,—Held, that one of the shareholders in the railway company was entitled to sue on behalf of himself and all the other shareholders (except the directors who were defendants), although some of these shareholders had taken shares in the steam-packet company.

Although a plaintiff who files a bill on behalf of himself and other shareholders in a railway company may be suing at the instigation of another rival company, that circumstance is not sufficient to prevent him from obtaining a special injunction on the merits of his case, upon a bill so framed.

The plaintiff was a shareholder in the Eastern Counties Railway Company, and this bill was filed by him on behalf of himself and all other proprietors of shares in that company, (except the several persons thereinafter named as defendants thereto,) who should come in and contribute to the expenses of the suit, against the company, and all the directors. The bill stated the act of parliament by which the Eastern Counties Railway Company was incorporated; and that a railway had been formed, partly by that company and partly by the Eastern Union Railway Company, from London to a place near Manningtree, within ten miles of the port of Harwich; that, for the purpose of providing the means of communication between Harwich and various ports on the continent, the directors of the two railway companies had proposed that a joint-stock company should be formed, to be called the Harwich Steam Packet Company, and that the shares in it should be offered to the holders of shares in those railway companies and two other railway companies. A prospectus of the projected steam-packet company was issued in September 1846, in which nine of the directors of the Eastern Counties Railway, and three of the directors of the Eastern Union Railway, formed the body of direc-

tors. The prospectus stated that "arrangements had been made with the Eastern Counties and Eastern Union Railway Companies, by which the proprietors of the steam-packet company would receive a dividend of not less than 5*l.* per cent. per annum, on their subscriptions," and that "a copy of the deed of settlement might be inspected at the offices of that company, and of the Eastern Counties and Eastern Union Railway Companies." A copy of this prospectus was forwarded, together with a letter, containing an offer of shares in the steam-packet company, to all the shareholders in the Eastern Counties Railway Company. On the 8th of October 1846 a circular was forwarded from the secretary of the steam-packet company to the parties to whom the former circular had been sent, in the following terms: "Several inquiries having been made by parties to whom shares in the Harwich Steam Packet Company have been appropriated as to the exact arrangements which have been made by the Eastern Counties and Eastern Union Railway Companies, for the benefit of the proprietors of the steam-packet company, I am desired to inform you, that, under the contract between this company and the above two railway companies, the latter engage to guarantee that a minimum dividend of 5*l.* per cent. per annum shall be paid to the proprietors of the steam-packet company, upon their paid-up capital, until the company shall be dissolved, and that upon that dissolution taking place, the whole paid-up capital shall be returned to the shareholders in exchange for a transfer of the assets and property of the steam-packet company." The bill then stated that, in October 1846, the plaintiff called upon the secretary to inquire into the nature of the arrangement between the companies, and was informed that the proposed arrangement was of this nature: that passengers should be conveyed (for instance) from London to Rotterdam, for certain fixed fares: and that if it was found necessary that the whole of those fares should be paid over to the steam-packet company, in order to declare a dividend to their shareholders of 5*l.* per cent., the railway company would pay the whole amount received for the fares to the steam-packet company.

A deed of settlement was prepared for the steam-packet company, in which it was provided that the shareholders in that company must hold shares in one of the railway companies to be entitled to vote at general meetings; and also, that the steam-packet company should be dissolved upon the railway companies requiring it, and upon their paying or tendering the amount of capital which should be paid up on the shares in the steam-packet company, together with interest at 5*l.* per cent.

The bill stated, that many of the proprietors of shares of the Eastern Counties Railway Company had declined to take any share in the steam-packet company, and had altogether disapproved of the proposed arrangement between the railway company and the steam-packet company; but that several proprietors of shares in the Eastern Counties Railway Company, upon the faith of the representations contained in the circular or prospectus, and letter of the 8th of October 1846, that the said railway companies had contracted or undertaken to give such guarantee as therein mentioned or referred to, in favour of the steam-packet company, had accepted the shares which were allotted to them, and had paid the deposits thereon, and that by the means aforesaid a considerable sum of money had been received by and was then in the hands of the directors of the last-mentioned company for the purposes thereof.

On the 9th of November 1846 another circular was sent by the secretary of the steam-packet company, in which it was stated, "The deed of settlement has been prepared with the greatest care, and entirely protective of the shareholders against all partnership liability. The Eastern Counties and Eastern Union Railway directors have approved of the contract between those companies and the steam-packet company guaranteeing 5*l.* per cent. per annum, as a minimum dividend on the packet company's shares, and further guaranteeing the return of the capital in full in case of the dissolution of the company."

The bill stated, that at present no contract or agreement had been entered into with the Harwich Steam Packet Company, or with any person or persons on their be-

half, under the common seal of the Eastern Counties Railway Company, or signed by any three directors thereof, on behalf of the said railway company, or in any other manner sufficient to render an agreement or contract legally binding upon the said railway company.

The bill prayed a declaration that it would be a breach of trust on the part of the directors of the Eastern Counties Railway Company to enter into any contract, agreement, or undertaking on behalf of the Eastern Counties Railway Company to guarantee to the Harwich Steam-Packet Company, or to any person or persons on their behalf, any dividend on their capital, or any part thereof, or the repayment of the said capital, or any part thereof, in case of the dissolution of the steam-packet company, or in any other event whatsoever, or to apply any funds of the railway company in making any payment to the steam-packet company, or any shareholders therein, for any of the purposes aforesaid. And that it might also be declared that the directors of the railway company were not authorized to make any reduction from their usual rates, tolls, or charges for any passengers or goods passing or being conveyed along the Eastern Counties Railway, in favour of any person or persons who, or any goods which should have been conveyed to or should then be about to be conveyed from Harwich by any steam packet belonging to the said steam-packet company. And that the directors of the Eastern Counties Railway Company might be restrained by injunction from entering into such proposed arrangement, or any such contract, agreement, or undertaking as aforesaid, and from applying any funds of the said railway company in making any payment to the steam-packet company, or any shareholder therein, for any of the purposes aforesaid, and also from making any such reduction as aforesaid in any of their usual rates, tolls, or charges, and also from receiving, or allowing any clerk, agent, or officer of the railway company to receive, any sums of money for or in respect or on account of any fare, charge, or other remuneration which might be paid to or charged by the said steam-packet company for conveyance of any passengers or goods by any packet-boat beloging to the said last-mentioned company.

On the 19th of November 1846, a special injunction was granted *ex parte*, by the Master of the Rolls, to restrain the defendants, the directors, until the 26th of November, from entering into the proposed arrangement with the steam-packet company, or any such contract, agreement, or undertaking as was mentioned in the bill. This injunction was afterwards continued till the 14th of December, when the case was argued before the Master of the Rolls, upon a motion and a cross-motion: the defendants moving to dissolve the injunction, and the plaintiff moving to continue it.

An affidavit of Mr. Roney, who was the secretary of the Eastern Counties Railway Company, stated that it was the general practice for railway companies to agree with the proprietors of coaches, omnibuses, and other vehicles for the conveyance of passengers and goods between the various stations on the railways and adjoining places, with a view to increase the traffic on the railways, and that the railway companies usually guaranteed to the proprietors of the coaches or omnibuses a per-centage of at least 5*l.* per cent., and indemnified them against loss in the use of their vehicles; that he believed that the proposed arrangement with the Harwich Steam Packet Company would be very beneficial to the railway company; that the arrangement had not been agreed to by the shareholders in the railway company, nor had it been discussed at any meeting of their shareholders called for that purpose; that there were more than eight thousand shareholders in the Eastern Counties Railway Company: that the plaintiff was a wharfinger, and in that capacity was an agent of the General Steam Navigation Company, and that his solicitors in this suit were the solicitors of that company; and that the deponent believed that the bill had been filed and the injunction obtained at the instigation and request of the General Steam Navigation Company, who feared that their interests would be injuriously affected by the establishment of the Harwich Steam Packet Company, and not for the purpose of protecting the interest of the shareholders in the railway company;

that a special general meeting of the shareholders in the Eastern Counties Railway Company had been held on the 12th of November 1846, and that the chairman of the company had then stated, that nothing would be done to bind the shareholders of the railway company to any arrangement with the Steam Packet Company, until such arrangement should have been approved at a special general meeting convened for that purpose; and that the directors had not nor ever had any intention of entering into any such contract without the sanction of their shareholders.

Mr. Kindersley and *Mr. Grove*, for the railway company.—The plaintiff insists that the directors are in the position of trustees; and he seeks to prevent them from making a particular application of the funds in which he is interested, because he thinks it will be injurious to his interests, or at least to the interests of the General Steam Navigation Company. If the directors propose to do any thing which is against public policy, the Court may, on that ground, restrain them; but if the majority of the shareholders present at a general meeting should sanction this application of the funds or any other outlay, not violating any rule of public policy or the restrictions which the act of incorporation imposes upon them, the company, as an incorporated body, have full power to employ their funds in any project which their shareholders approve of. It is shewn that the directors never had any intention of entering into these projected arrangements without the previous concurrence of their shareholders; and, if they obtain that concurrence, they have the power to make any such arrangement. If the company had 150,000*l.* in their bankers' hands, they might give that money for this purpose, and they have the same power to guarantee a fund of a like amount. In *Natusch* v. *Irving* (1) a joint-stock company was formed for effecting life and fire assurance, and an attempt was made to extend the business to marine insurance, which was an entirely different kind of speculation. But in this case the parties propose to guarantee a steam-packet company merely because it will promote the interest of the railway. Secondly, the plaintiff sues not only on behalf of himself and any shareholders who agree with him, but also on behalf of those shareholders who approve of the project, who have taken shares in the steam-packet company, and who are anxious that the arrangement should not be disturbed. He is not, therefore, entitled to carry on the suit so framed, or to sue for parties whose interest is different from his own. Thirdly, he comes before the Court, not as the *bonâ fide* plaintiff in the case, but for the purpose of protecting another party, a rival company. That alone is a reason for getting rid of his injunction. If he can maintain such a case at the hearing, he will then have all the benefit to which his rights entitle him; but where no irreparable mischief is likely to arise, the Court will not grant its aid by injunction under such circumstances as these.

Mr. Turner, *Mr. Roupell*, and *Mr. Twells*, for the plaintiff.—This case rests upon a principle which the Court always applies to partnerships; namely, that where a partnership has been formed for a particular purpose, a majority of the partners cannot require the minority, or even a single dissentient partner, to engage in any project which would alter the nature or terms of the partnership. In an ordinary partnership between a few individuals, the Court looks at the partnership deed, to see what the object of the partnership was. In the case of a railway company, the Court will look at the act of parliament by which the company was incorporated; and if a steam-packet company is not within the scope of the act which incorporated the Eastern Counties Railway Company, no decision of the directors, nor any vote of a general meeting, can in any way affect the rights of any dissentient shareholder. Mere regulations for the purposes of the partnership are within the power of a majority, but they cannot change the general character of the concern—*Const* v. *Harris* (2), *Natusch* v. *Irving*.

[The MASTER OF THE ROLLS.—It might be a very great advantage to this railway, in

(1) Gow on Partnership, App. 404.

(2) Turn. & Russ. 496.

addition to this steam-packet company, if there was also an arrangement made for bringing the traffic on the other side from various parts of the continent to the German ports; for instance, Hamburgh or Rotterdam. Would it be within the competency of this railway company to undertake to pay those foreign companies who might bring the traffic to a foreign port for the benefit of the railway company here?]

Could the South-Western Railway Company make its funds liable for steam navigation in the Red Sea, or could a Waterford and Valentia Railway Company guarantee a line of steam-packets from Valentia to New York? Under the act of parliament, no such powers are given to this company, and it is contrary to the law of partnership that they should exercise any such power; nor can a partnership company, by means of a general meeting, exercise any powers which are not intrusted to the directors, with the exception of some few which are particularly mentioned, such as declaring a dividend. If, therefore, the directors have not authority without the sanction of a general meeting to enter into such a contract, no general meeting can confer the power upon them. The principle that railway companies are to be held strictly to the powers granted to them in their acts of parliament, has been laid down by the present Lord Chancellor in numerous cases.

Secondly, as to the right of the plaintiff to sue on behalf of all the shareholders, there is a common interest in all of them that the provisions of their act should be complied with. They have no power to do the acts which the plaintiff complains of, and therefore they have no right to prevent him from suing on their behalf to protect a fund which they have no power to apply in that manner, and they are not necessary parties to such a suit—*Richardson* v. *Hastings* (3), *Wallworth* v. *Holt* (4). There is one common right, and one common interest in all the shareholders; and, therefore, any one of them is entitled to represent all the others; and there is no suggestion in the bill that any of the other shareholders do acquiesce in this arrangement. Some took shares in the steam-packet company, upon the supposition that the guarantee would be given, but they do not necessarily approve of giving the guarantee.

Lastly, whether the plaintiff is or is not instigated by the General Steam Navigation Company, is not material. The Court will look to the rights of the parties, and not to the motives which led to the institution of the suit. If the guarantee were given, and any money of the railway company paid over to the projected steam-packet company, the plaintiff would share the loss, and he has a clear title to be protected from that risk, and to have the funds of the company properly applied. There is no allegation that the plaintiff is indemnified by the General Steam Navigation Company.

Mr. Kindersley replied.

Dec. 17.—The MASTER OF THE ROLLS.—This is a motion made to dissolve an injunction, granted *ex parte*, for the purpose of restraining the defendants from entering into a particular agreement with a company or intended company, to be called the Harwich Steam Packet Company. There are three sorts of reasons which are offered for this—one is personal to the plaintiff, and I may as well dispose of that at once, by saying, that looking at the affidavit of Mr. Roney, I am of opinion, that there is not upon that affidavit sufficient ground for me to say, that the plaintiff has not a right to sue, and has not a right to ask for an injunction if the merits of this case entitle him to do so.

The next objection which is made is as to the form of the pleadings,—the way in which they are brought forward. That objection is of such a nature that I do not think I should be right in coming to a conclusion upon it, without carefully examining for myself the frame of the record, which I certainly will do if the parties desire it.

The other ground alleged for this motion is upon the merits; and after the discussion which has been entered into, and consider-

(3) 7 Beav. 323; s. c. 13 Law J. Rep. (N.S.) Chanc. 142.

(4) 4 Myl. & Cr. 619; s. c. 10 Law J. Rep. (N.S.) Chanc. 138.

ing the great and extensive importance which belongs to it, I think that I ought not to abstain from giving my opinion upon the point which it has occurred to me to be right to form.

There are, no doubt, four parties here to be considered. There are the plaintiff; the defendants the Eastern Counties Railway Company, and another railway company connected with it, called the Eastern Union Railway Company; and there is also the General Steam Navigation Company and a company or proposed company called the Harwich Steam Packet Company. The plaintiff is a shareholder in the Eastern Counties Railway Company, and has no interest whatever except in that company; he has no interest, and he is exposed to no liability except such liabilities as are incurred in carrying on the business of that company.

Now, companies of this kind, with powers so extensive, are so recently introduced into this country, that I believe that neither the legislature nor the courts of justice have been yet enabled to understand all the different lights in which their transactions ought properly to be viewed; we must, however, adhere to ancient general settled principles, so far as they can be applied to great combinations and companies of this kind,—joint-stock companies getting possession of funds so extremely large, exercising powers so extensive, so materially affecting the rights and the interests of a great variety of other persons, and what must, perhaps, everywhere be considered still more, so greatly affecting the rights of the public, the rights which the subjects of Her Majesty are accustomed to enjoy under the protection of the laws established in this kingdom.

To look upon a railway company as in the light of a common partnership, and to be subject to no greater vigilance than common partnerships may be, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference with the public and private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be obtained by the public; but the public interest being to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by the several acts necessarily occasion, they must always be carefully looked to; and I am clearly of opinion, that the powers which are given by an act of parliament like that which is now in question, extend no further than is expressly stated in the act, or necessarily and properly acquired for the purposes which the act has sanctioned. How far those powers, which are necessarily or conveniently to be exercised for the purpose intended by the act, may extend, will very often be a subject of great difficulty. We cannot always ascertain what they are—powers ample are given for the purpose of constructing the railway—powers ample are given for maintaining the railway—powers ample are also given for doing all those things which are required for the proper use of the railway; but I apprehend that it has nowhere been stated, that a railway company have power as much as they can obtain to enter into all sorts of transactions. Indeed, it is admitted, and very properly admitted, that they have not a right to enter into new trades and into new businesses not pointed out by the act. But it is contended, that, without limit, they have a right to pledge the funds of the company, for the encouragement of other transactions, however various and however extensive, provided only they profess that that encouragement being occasioned by the liability of their own shareholders, the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. Surely, that has nowhere been stated; there is no authority for anything of that kind. What has been stated is, that these things to a small extent have frequently been done since the establishment of railways. Be it so; but unless those acts so done can be proved to be in conformity with the powers given by the special acts of parliament under which those acts are done, they furnish no authority whatever.

To suppose that the acquiescence of railway shareholders for the last fifteen years, in any transaction conducted by a railway company, is any evidence whatever of their

having a lawful right to enter into it, is, I think, wholly to forget the frenzy in which the country has been for the last fifteen or sixteen years, or thereabouts. There is no project, however wild, which has not been encouraged by some one or more of these companies. There is no project, however wild, which the shareholders or the persons liable in respect of those companies, have not acquiesced in from one cause or another, either from cupidity, and the hope of gaining extraordinary profits beyond their first anticipations; or from terror of entering into a contest with persons so powerful. I look upon the acquiescence which may have taken place in these things, in the absence of any legal decision, as affording no ground whatever for the presumption, that these several transactions may be legal.

But look at this transaction. Now I am far from saying that that which is proposed to be done might not be extremely profitable to this company—I am far from meaning to say that it might not be a great public advantage—I am far from expressing the least opinion that the establishment of a steam-packet company at Harwich, communicating with this railway, might not only be of public, but what is in common parlance thought still more extensive, of national importance—I am far from saying that it might not be in the highest degree proper to give this company authority to do that which they are now attempting to do, as it seems to me, without authority. I mean to express no opinion against that whatever. But what they are doing is this. Under the powers of this particular act of parliament, which enables them to do what is required for the construction, for the support and maintenance, and for the proper and convenient use of this railway, they are proposing to pledge the funds of this company, however large they may be,—it is said they are millions: four millions—seven millions—have been stated to me—I have looked only to the first act of parliament, and that gives them authority to raise 1,600,000*l.*, which is stated, probably with perfect truth, to have been subsequently extended—but it is proposed to pledge the funds of this company to support the proposed Harwich Steam Packet Company to the extent of 150,000*l.*, or up to 300,000*l.* The agreement is of this nature: to certain individuals a proposition is made; do you establish a steam-packet company from Harwich to the northern ports, and we will do all that we can to encourage the shareholders in the railway company to become shareholders in the steam-packet company. That might be a very legitimate and very proper mode of encouragement, because it is done at the expense and at the risk of each individual who makes his own choice. But, besides this, whatever may be the success of the steam-packet company, if it should fail, however greatly, nobody shall subscribe to it without having it provided, that out of the funds of the railway company interest to the extent of 5*l.* per cent. shall be paid upon his subscription; and moreover if it should fail altogether, so that it would be proper to put an end to it, the funds of the railway company shall be pledged to pay back to every subscriber to the steam-boat company the full amount of his subscription.

Now, it is not proposed that the railway company should immediately, and by their own directors, engage in the steam-packet company and carry on the trade—that is not a part of the agreement; as it has been stated to me, it very possibly might be a part of the agreement otherwise arranged, but that is not proposed. It is proposed only that they should have the whole risk and liability, the whole risk of paying interest at the rate of 5*l.* per cent., and if the transaction should turn out an unprofitable transaction, the making good to every subscriber towards it the full amount which he has paid. Now, is there anything which can be considered as sanctioning that in the course of this act of parliament? To construct, to maintain, to regulate the traffic, to do all that is necessary for the purpose of carrying on the traffic, does that imply that they are to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable add to the profits of the railway company? Surely there is nothing in the powers which are given by this act of parliament which can do that. It is stated that I must either allow this to be done, or that I must allow that nothing can be done that is at all out of the express words of the act of parliament. Now,

I am of opinion, certainly, that until I had known it to be decided by higher authority, which in matters of such great importance as this will probably be done either in this case, or in some other, this itself is not within the powers which are given by the act of parliament; and when another case is brought before the Court, that case will be judged of by the circumstances which attend it. But I am not afraid to say that in any case, however small, which is within the principle of this act, to pledge the funds of this company for the purpose of supporting another company which is engaged in a hazardous speculation, is a thing which, according to the terms of this act of parliament, they have not a right to do. I am far from saying, at the same time, that there are not many small things of this sort which are extremely obvious, and might be so extremely beneficial, that when all the shareholders knew them they would all acquiesce in them, and never think of complaining of them. Therefore it does not follow that they cannot do any the least thing—I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of parliament, and they have no power of doing anything beyond it. I do not mean myself to enter into a discussion about public policy here; but this one cannot fail to observe, that if there is any one thing which is more desirable than another, after providing for the safety of all persons who travel upon railways, it is this: that the property invested in railway companies should be itself safe; that a railway investment should not be considered, and not be a wild speculation exposing those who are engaged in it to all sorts of risks, whether they intended it or not: but considering the vast property which is invested in railways and easily transferable, perhaps one of the best things that could happen to them would be, that the investment should be of such a safe nature that prudent persons might, without improper hazard, employ their monies in it. Quite sure am I that nothing of that kind can be approached if railway companies should actually be found at liberty to pledge their funds in support of plausible speculations, which however probably leading to advantage, might very possibly, to say the least, lead to extraordinary losses on the part of the railway company. I say now, as I said at first, I consider that this is a question of vast importance—I consider it to be of great importance, not merely to the railway companies who claim these powers, but of great importance to the public in a great variety of ways, more than it is in the least degree necessary for me to express upon this occasion. I say, therefore, that, subject to the examination which I shall feel it my duty to give to the pleadings before me, I shall not dissolve this injunction. If I find that the pleadings are improperly framed, then I think it ought to be brought forward in another form —there ought to be a demurrer. I do not know whether the defendants would be disposed to file a demurrer, that the question might be discussed upon it, because the granting of an injunction, or the continuing of an injunction, if such an objection as that which is made be real, would not, of course, deprive them of the demurrer. Will you be good enough to hand me up a copy of the bill.

With regard to the construction of the bill, the cases of *Preston* v. *the Grand Collier Dock Company* (5), *Bromley* v. *Smith* (6), and *Richardson* v. *Larpent* (7), were mentioned to his Lordship; and on the 23rd of December,

His Lordship stated that he had read through the bill, and was of opinion that the frame of it was correct, and that the injunction must be continued.

Note.—The case was again mentioned to the Master of the Rolls, on behalf of the defendants, on the 23rd of January 1847, when his Lordship stated, that the injunction referred only to the case before him, and to the guarantee proposed to be given to the projected steam-packet company; and that as to any arrangement with any steam-packet company, respecting the rates and tolls to be charged on the railway, the injunction left the directors all the same powers, and no more, which they would have independently of it.

(5) 11 Sim. 327; s. c. 10 Law J. Rep. (N.S.) Chanc. 73.
(6) 1 Ibid. 8; s. c. 5 Law J. Rep. Chanc. 53.
(7) 2 You. & Coll. C.C. 507.

M.R.
May 1, 2, 4, 5, 6; Nov. 24. } FORDYCE v. BRIDGES.

Will—Parties—Pleading—Construction—Appointment of New Trustees—Discretionary Power—Irregular Decree—Form of Suit.

A testator in 1807 *executed a deed of tailzie of his Scotch estates, limiting the same to various relatives, with clauses rendering the estates of the successive heirs substitute inalienable. In* 1808, *the testator by will devised his English estates to three trustees, in strict settlement; and gave them his residuary personal estate, in trust to lay out the same in the purchase of estates in England or Scotland, and to settle the purchased English estates to the uses contained in his will, and the purchased Scotch estates to the uses expressed in the deed of tailzie. By the will, power was given to the person entitled to the actual possession of the devised estates to appoint new trustees, on any of the trustees dying or declining to act. The testator died in* 1812. *On the death of J. D, the first party beneficially interested in the estates, there was a very large residuary personal estate, and he was succeeded in the estates by his son, J. D. D, the heir substitute in possession under the deed, and tenant in tail under the will. A very considerable part of the residuary personal estate was invested by the trustees in the purchase of Scotch estates, and a small part only in the purchase of English estates, and these estates were respectively settled to the uses expressed in the deed and will. The trustees having died, and the representative of the last surviving trustee desiring to be discharged, a bill was filed in* 1833 *by the next friend of J. D. D, an infant, complaining that the trusts had not been properly invested, and, amongst other things, seeking the appointment of new trustees, and a declaration of the Court that the residue of the personal estate ought to be invested in the purchase of real estates in England. The earliest of the heirs substitute after J. D. D. interested in the estates were not parties to the suit, though others more remotely interested therein were, as also the representative of the last surviving trustee. A decree was made in* 1833, *whereby a reference was directed for the appointment of new trustees, and it was declared, that the personal estate remaining uninvested ought to be invested in the purchase of real estates in England. J. D. D. having attained his majority in* 1836, *executed a disentailing deed, and shortly afterwards the uninvested personal estate was ordered to be transferred to him. He died in* 1840, *without issue. In* 1841, *a bill was filed by A. D. F, the next substitute heir in possession under the Scotch deed of tailzie, praying that the decrees and proceedings in the suit instituted on behalf of J. D. D. might be declared irregular, and that the plaintiff might be relieved therefrom:—Held, that A. D. F. was not bound by the decree in the suit of J. D. D, and that the heirs substitute under the deed of tailzie were not substantially represented in that suit; and that his present bill was a proper bill; that the new trustees had been irregularly appointed in the suit of J. D. D; and that the personal estate directed to be transferred in* 1836 *to J. D. D, ought to be restored out of his assets.*

This bill was filed, by Arthur Dingwall Fordyce, against Sir Henry Bridges, and several other persons, praying, in effect, for a declaration that the decrees and proceedings in a former cause, relating to the same matters which were in question in this suit, might be declared irregular and not binding upon the plaintiff and the several defendants interested in the estate of John Dingwall, deceased, the testator in the cause: and praying further, that notwithstanding such decrees and proceedings, proper directions might now be given to provide for and secure the due execution of the trusts of the testator's will.

John Dingwall, the testator, was one of a numerous Scotch family, whose common ancestor was the testator's grandfather. They were distinguished as the Dingwalls of Brucklay, the Dingwalls of Culsh, and the Dingwalls of Rannieston. The testator was a member of the Brucklay branch, and had real estates both in England and in Scotland. On the 7th of September 1807, he executed a deed of tailzie of his Scotch estates, and thereby limited the same to John Dingwall, his grand-nephew, and the heirs of his body; whom failing, to

the heirs male of the body of the deceased William Dingwall, of Culsh; whom failing, to the heirs male of the body of the deceased John Dingwall, of Rannieston; whom failing, to the heirs male of the body of Catherine Stewart, his grand-niece; whom failing, to the heirs female of the body of the deceased William Dingwall, of Culsh; whom failing, to the heirs female of the body of the deceased John Dingwall, of Rannieston; whom all failing, to his own nearest heirs and assigns. The deed was expressed in the strictest terms, and with clauses to extend, so as, by the law of Scotland, to render the estates of the successive heirs substitute inalienable. By a subsequent deed, a particular member of the family was excluded from all right of succession under it; but in all other respects the deed remained unaltered.

On the 13th of June 1808 the testator duly made his will, and thereby devised his English estates to James Chalmers, Alexander Crombie, and George Burley, in trust for the use of his grand-nephew, John Dingwall, for life, with remainder to the trustees to preserve contingent remainders, with remainder to the first and other sons of the said John Dingwall, successively, in tail male, with remainder to the use of the daughters of John Dingwall, successively, in tail male, with remainder to the use of Arthur Dingwall Fordyce, of Culsh, who was the heir male of William Dingwall, of Culsh, and the grandfather of the plaintiff, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the sons of Arthur Dingwall Fordyce, successively, in tail male, with many other limitations over, and ultimately to the testator's right heirs; and the will declared, that if any person to whom the testator had given an estate tail should be living at the time of his death, he revoked the devise in tail male to that person, and gave him or her, in lieu thereof, an estate for life, with remainder to the trustees to preserve contingent remainders, with remainder to the use of his or her first or other sons successively in tail male: and after providing for the receipt of rent during minorities, and the application of a competent part thereof to the maintenance and education of the infant, the testator directed the residue of the rents to be invested, in the names of the trustees, in government or real securities in England or Scotland, so that the same might accumulate, and at the end of such period of accumulation, or sooner if they should think proper, the trustees were to convert the accumulated fund, and invest the same in the purchase of freehold, copyhold, and leasehold hereditaments, to be situate in England or in Scotland, and to settle the lands to be purchased to the uses and in the manner in which he had before devised the hereditaments from which the accumulations proceeded; and the testator bequeathed the clear residue of his personal estate to the said trustees, in trust to lay out and invest the same in the purchase of estates in England or in Scotland, and to settle such of the said estates as should be in England to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations in his will before limited, expressed, and declared concerning the estates thereby devised, and to settle such of the estates so to be purchased as aforesaid as should be in Scotland to the uses, and upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements before limited and expressed, in the manner in which he had settled his estates at Brucklay, by the deed of settlement dated the 7th of September 1807; and after giving directions for the application of the incomes of his residuary personal estate until proper purchases should be found, the will contains the following words:—"In case any of them, the said James Chalmers, Alexander Crombie, and George Burley, or any trustee to be appointed as hereinafter is mentioned, or their, or any of their heirs, executors, administrators, or assigns, shall happen to die, or refuse to act, or become incapable of acting in the trusts of this my will, then and in that case and so often as the same shall happen, it shall and may be lawful to and for the person or persons who for the time being shall be entitled to the actual possession, or to the actual receipt of the rents of the estates hereby devised, if such person or persons shall be of full age, and with respect to females whether they shall be single or married, and to and for his and their guardian or guardians respectively during his, her, or their minority, or respective mino-

rities, by deed or writing to be sealed and delivered in the presence of, and attested by two or more credible witnesses, to appoint some other person or persons to be trustee or trustees under this my will for all or any of the trusts hereinbefore declared, and in the room or place of the trustee so refusing, declining, or becoming incapable to act, and thereupon all such acts, deeds, and things shall be had, made, done, and executed, as shall be proper or necessary for effectually vesting the trust estates and premises in the new trustee or trustees, either solely, or jointly with the surviving or continuing trustee or trustees, as the case may require; and every such new trustee shall thereupon have all the same powers and capacities, and exemptions and privileges, as the trustee in whose room he shall be substituted."

The testator died on the 28th of May 1812, leaving his trustees, who were also executors of his will, and his grand-nephew, John Dingwall, the first tenant for life under the will and the institute under the deed of entail, him surviving. John Dingwall was let into possession of the estates, both in England and in Scotland. The executors duly proved the will, possessed the personal estate, paid the debts, and had in their hands a very large residuary personal estate to be applied on the trusts of the will, that is, to be invested in land in England, or in Scotland. After the testator's death the trustees laid out 173,443*l.* in the purchase of Scotch land, and only 1,529*l.* in the purchase of English land. For twenty years and upwards after the testator's death the property was enjoyed by J. Dingwall, the grand-nephew, the institute of the Scotch estate. During his life all the trustees and executors died. The last survivor was A. Crombie, whose son, also called A. Crombie, became his real and personal representative; J. Dingwall died on the 21st of January 1833, leaving his son J. D. Dingwall, then seventeen years old, his only child. There was at that time a very large sum of uninvested residuary personal estate of the testator, which remained to be invested in England or Scotland. If J. D. Dingwall had then died, the whole trust would have had to be executed in favour of A. D. Fordyce, the next substitute or remainder-man, then a very old man, and those entitled in succession after him: the Brucklay branch of the Dingwalls would have been then exhausted, as it was a few years afterwards. As things stood, J. D. Dingwall, the infant, was, as to the purchased estates in England, tenant in tail, entitled in possession, and he was, as to the estates purchased in Scotland, first heir substitute without power of alienation, with a succession to his own heirs male, if he should have any; whom failing, to A. Dingwall Fordyce, whose eldest son William had died a year or two before, leaving an eldest son Arthur, a second son William, and a third son Alexander, who was the present plaintiff, and a great many other persons who might eventually become entitled, some of them as heirs male of the body of W. Dingwall, of Culsh, and others as heirs male of the body of J. Dingwall, of Rannieston, with other remainders over; and as to the uninvested residue of the personal estate, J. D. Dingwall, the infant, was entitled to have the trust to invest the same in land in England or Scotland, executed for the benefit of himself and those entitled in remainder in succession after him, according to the laws of the two countries respectively.

J. D. Dingwall was an infant, and he had no legal guardian; and the representative of the last surviving trustee desired to be discharged from the trusts. It was, therefore, clearly necessary to apply to the Court for the appointment of a guardian, and for the appointment, or the means of appointing, new trustees; and in April 1833, a bill was filed on the behalf of J. D. Dingwall, by W. Gordon, his maternal grandfather, which alleged that the trusts had not been properly performed by the deceased trustees, and that they had invested in the purchase of land in Scotland a larger portion of the residuary estate than they ought to have done; and it asked of the Court to declare whether the estates in Scotland had been properly purchased, and whether it was necessary to give any direction in consequence of the disproportionately large amount of the remaining residue invested in land in Scotland, and that the residue might be invested in the purchase of real estate in England. Only one person interested in the succession was then within the jurisdiction of the Court, and that was Patrick Dingwall, as male descendant of the Rannieston branch, who could

be entitled to nothing under the deed of tailzie until the male descendants of the Culsh branch, and the prior sons of the Rannieston branch, were exhausted. The bill was, in fact, filed against A. Crombie, the representative of the surviving trustee, against P. Dingwall, *one*, but by no means the *first* of the heirs substitute of the Rannieston branch, against A. D. Fordyce, the first heir substitute of the Culsh branch, and against other persons alleged to be interested, but who did not appear to the bill, and it did not appear that they were even served with process. A. Crombie and P. Dingwall put in their several answers, without oath. A. D. Fordyce, who was eighty-eight years of age, was never served with process; but an appearance was entered for him, and his answer was put in without oath or signature.

Before the cause was brought to a hearing, W. Gordon was appointed guardian of the infant plaintiff, and by the decree, dated the 3rd day of August 1833, after directing certain inquiries, Mr. Crombie was, at his own request, discharged from being a trustee, and it was referred to the Master to approve of new trustees; and it was declared, that under the circumstances of the case, and having regard to the purchase of land in Scotland made by the trustees, the residuary personal estate then remaining uninvested ought to be invested in the purchase of real estates in England; and for the purpose of such investment, the parties interested—the new trustees and the guardian—were to be at liberty to lay proposals before the Master.

The present plaintiff alleged that this decree was not binding upon him, and that he was entitled to be relieved from it in the present suit. The proceedings under the decree were carried on before the Master, without notice to the defendant A. D. Fordyce or his son, who were substitute heirs of entail. A. D. Fordyce died, at the age of eighty-nine years, on the 21st of April 1834, and a few days afterwards, that is, on the 26th, the Master made his general report.

It appeared that the uninvested residuary personal estate was of very large amount; that the Master had approved of W. Gordon, P. Rose and J. A. Chalmers to be new trustees, but that no proposal had been laid before him to invest any part of the residuary personal estate in the purchase of real estate.

By the order made on further directions, on the 4th of June 1834, it was directed that the estate should be transferred to the new trustees, and this was done by deeds executed in the following month of July. J. D. Dingwall attained his age of twenty-one years on the 15th of October 1836. If the large fund in court had been laid out in the purchase of English lands in the manner authorized by the decree of the 3rd day of August 1833, J. D. Dingwall would have been entitled to those lands as tenant in tail in possession. He was, under the decree, entitled to have the money so laid out, and he without delay took the necessary steps to obtain possession of the money. In November 1836, he executed a disentailing deed, and on the 21st of the same month petitioned to have the whole of the fund transferred and paid to him; and by an order, dated the 24th of November 1836, after providing for the payment of the legacy duty and the costs, it was ordered that the fund should be transferred and paid to him accordingly. It was admitted at the hearing, that this order was merely consequential upon the decree, and that it altered no rights whatever, but must follow the fate of the decree. It was said, that J. D. Dingwall, having obtained the money, laid out the whole, or if not the whole, at least part of it, in the purchase of Scotch free land, in the neighbourhood of the Scotch land purchased under the trusts of the testator's will. He made an English will, dated the 3rd of July 1840, and also executed a deed of disposition according to the law of Scotland, dated the 1st of September 1840; he died without issue on the 26th of October 1840, and thereupon and by virtue of his will and deed, his Scotch and English estates became vested in the defendant, Sir Henry Bridges.

On the 20th of November 1841, A. D. Fordyce, the eldest grandson of the old A. D. Fordyce, party to the cause, and who, upon the death of his grandfather, became the next substitute heir of the settled estates, filed his bill of complaint in this court, praying that the decrees, orders, and proceedings in the cause of J. D. Dingwall might be declared to be irregular, and that he might be relieved therefrom. The cause

was prosecuted to issue; but before it was brought to a hearing A. D. Fordyce died without issue, and thereupon, and in consequence of the pre-decease of an elder brother, William, the present plaintiff succeeded and became substitute heir entitled in possession to the settled Scotch estates. He filed a supplemental bill in July 1844: and the cause now came on to be heard.

Mr. Kindersley, *Mr. G. Turner* and *Mr. Anderson*, for the plaintiff, contended that the Scotch estates settled by the testator by the deed of tailzie, were, by the law of Scotland enacted in the year 1785, rendered inalienable, in like manner as certain estates of the Duke of Wellington, Earl of Shrewsbury, and Earl of Arundel in England, were made so by particular acts of parliament; and that, therefore, so much at least of the testator's residuary personal estate as ought to have been invested in Scotch estates ought not to have been transferred to the plaintiff in the former suit; that the proceedings and decree in that suit were clearly defective for want of parties thereto, and the order made therein in 1836 was merely consequential on that decree; that one party was never allowed in a suit to represent others in the same interest, except where the parties were so numerous that it was impossible to bring them all before the Court, with a chance of bringing the suit to a hearing within a reasonable period; that the doctrine applicable to the case of a tenant in tail had never been applied to the case of an executory devise; that the present bill being in the nature of a bill of review was the proper bill for the plaintiff to file, he being no party to the former suit; that in the former suit there existed a fatal omission in not bringing forward, at least, the next heir substitute on the death of Arthur Dingwall Fordyce; that the Court had no right or power to appoint new trustees in the former suit, the discretion so to do having been vested by the testator in persons particularly named in his will, and the new trustees were by the will to exercise and enjoy all the powers vested in the trustees named therein; and that if the plaintiff should be considered to have taken an erroneous view of his case in other respects, he was clearly right in insisting that the residuary personal estate of the testator should have been the subject of equal division between the English and Scotch *cestuis que trust*.

Mr. Purvis and *Mr. T. Stevens*, for several defendants, who were all infants, contended that the original suit was erroneous, both in constitution and on principle; that the answer to that suit of one of the heirs substitute did not attempt to protect the Scotch line of succession; and the defendant Crombie, the representative of the surviving trustee, repudiated the whole of the trusts, so that there was no one in that suit to protect the rights of the present plaintiff.

Mr. Toller and *Mr. Forbes* appeared for other parties having remote interests only in the subject-matter of the suit.

Mr. R. Roupell and *Mr. Sidebottom*, for Sir H. Bridges, contended that the plaintiff had pursued an erroneous course in filing an original bill against the defendant Bridges, and that he ought to have filed a bill of supplement in the former suit; that the decree in the former suit, was, under the circumstances of the case, just, the trustees having previously laid out so large a portion of the testator's personal estate in the purchase of Scotch estates; that Dr. Crombie being desirous to be discharged, the appointment by the Court of new trustees was a proper course to have resort to; and that the present plaintiff had been guilty of laches, in not taking earlier proceedings, well aware as he was of what had taken place in the other suit.

Mr. Kindersley, in reply.

The following cases were cited in the course of the argument:—

Lloyd v. *Johns*, 9 Ves. 37.
Mitford on Pleading, 72, 98, and 141, 3rd edit.
Habergham v. *Vincent*, 1 Ves. jun. 411.
Wright v. *Atkyns*, 17 Ves. 255; s. c. Turn. & Russ. 143.
Cockburn v. *Thompson*, 16 Ves. 321.
Giffard v. *Hort*, 1 Sch. & Lef. 386.
Cruise's Digest, tit. 36, 'Recovery,' ch. 5, ss. 8, 12, 14.
Titley v. *Wolstenholme*, 7 Beav. 425; s. c. 13 Law J. Rep. (N.S.) Chanc. 410.
Cooke v. *Crawford*, 13 Sim. 91; s. c. 11 Law J. Rep. (N.S.) Chanc. 406.

Eaton v. *Smith*, 2 Beav. 236.
Cole v. *Wade*, 16 Ves. 27.
Lee v. *Young*, 2 You. & Col. C.C. 532; s. c. 12 Law J. Rep. (N.S.) Chanc. 479.
Bennett v. *Honywood*, Ambl. 708.
The Attorney General v. *Glegg*, Ibid. 584.
The Attorney General v. *Doyley*, 2 Eq. Ca. Abr. 194, pl. 15.
Harding v. *Glyn*, 1 Atk. 469, cited in *Brown* v. *Higgs*, 5 Ves. 495.
Longmore v. *Broom*, 7 Ves. 124.
Brown v. *Vermuden*, 1 Cases in Chancery, 272.
Urquhart v. *Urquhart*, 13 Sim. 613.
Story on Equity Pleading, 278.
Pink v. *De Thuisey*, 2 Madd. 158.
French v. *Davidson*, 3 Ibid. 396.
1 *Sugden on Powers*, 151, 6th edit. of 1836.
Gilbert's For. Rom. 180.
Price v. *Carver*, 3 Myl. & Cr. 157.
Powys v. *Mansfield*, 6 Sim. 528 and 637; s. c. 5 Law J. Rep. (N.S.) Chanc. 153, 297.
Hamilton v. *Houghton*, 2 Bligh, 169. (O.S.)

Nov. 24.—The Master of the Rolls (after stating the facts of the case).—The investment of the residuary personal estate of the original testator was to be made by the trustees and executors, and the will is wholly silent as to the whole or any proportionate part of the residue being invested either in England or in Scotland. An unlimited discretion in this respect seems to have been given to the trustees; and yet the testator must have well known that having regard to the succession, or to the continuance of the limitations which he designed, the investment in the purchase of land in Scotland would have an effect very different from the investment in the purchase of land in England; and he directed the lands purchased in Scotland to be transferred to the uses declared in the deed of tailzie, and the purchased lands in England to be transferred to the uses declared in his English will. The trustees, however, were to purchase the land in England or Scotland, without any expressed or apparent restriction on their discretion. (His Lordship then referred to the proceedings in the former suit.) From the frame of that bill and its prayer, it seems as if the pleader had his doubts whether the Court would interfere with the discretion of the trustees in the execution of such a trust as this; and, consequently, whether more could be done than to supply the want of trustees; but an attempt to induce the Court to interfere was plainly intended to be made, and a question of no small difficulty must have arisen respecting the parties to the cause: a determination by the Court that the uninvested personal estate should be invested in English land would have placed the whole in the absolute power of J. D. Dingwall, if, and as soon as he attained twenty-one years of age. A determination that it should be invested in Scotch land would have given him an inalienable estate, or, perhaps, what may be considered only a life estate, and would, upon the failure of his issue, have secured the succession to the Culsh branch of the family; but, on failure of male issue in that branch, to the Rannieston branch of the family, and so on. The eventual or contingent heirs substitute were, therefore, very materially interested in the question; and it might require consideration whether they, or at least such and so many of them as were sufficient to secure an effectual discussion of the question, ought not to have been made parties to the suit. In the answer, it is indeed expressed to be, that he insisted that the purchase of the real estate in Scotland out of the proceeds of the residuary estate of the testator had been properly made, and ought not to be disturbed; but I am very clearly of opinion that the suit was not so constituted as to afford any assurance that the question raised by the pleadings could be adequately and properly discussed and argued.

The first questions which I have now to decide are: whether the plaintiff is bound by the decree of the 3rd of August 1833; and, if not, whether he is endeavouring to obtain relief in a proper form: and I am of opinion that he is not bound by the decree. I think that the heir substitute of the Culsh branch, on failure of issue of the Brucklay branch, had a material and substantial interest in the question, whether the uninvested residuary personal estate was to be invested in the purchase

of English or Scotch land, and in the appointment of new trustees, and that there was not in the cause any substantial or effectual representation of or means of protecting that interest. As far as the persons entitled to it were concerned, the cause must, I think, be considered as having been heard *ex parte*.

I am not aware of any rule under which it can be deemed that the parties entitled to future succession can be bound by a decree to which a person in the situation of A. D. Fordyce was a party; and it appears to me that, under such circumstances, the present bill is in a proper form. It does not seek to alter a decree made against a plaintiff himself, or against any person under whom he claims, and it appears therefore to be his right to seek relief by his own bill.

It is therefore to be considered whether that which was done by the decree was proper and right to be done. I have before adverted to the circumstances of the case. The testator had given a discretionary power to his trustees, and had provided for the appointment of new trustees in a particular manner. The trustees appointed by the testator's will died, and the representative of the survivor declining to act, desired to be discharged.

Having given the testator's will my best consideration, it appears to me that, with the sanction of the Court, new trustees might have been duly appointed, and that the new trustees would have had the same discretionary power which was given to the original trustees appointed by the testator himself; and further, that such discretionary power as is given by this will, is not the power which the Court, in the absence and without the assistance of trustees, ought to take upon itself to exercise. I incline to think that, except by taking care that the persons to whom the testator intended to give the discretion, are duly appointed, and that what is done is done upon that discretion fairly exercised, the Court ought not to interfere at all. The Court itself has no means of ascertaining in such a case whether it is more or less in accordance with the will of the settlor, or with the interest of the parties entitled under the disposition, that the discretion should be exercised in favour of English or Scotch estates: the discretion cannot be subject to a rule of equality or proportion of any sort between the estates. There seems to be no tangible principle upon which the exercise of such a discretion can be in one way or other justified. The testator has given the discretion to private hands, appointed by himself, or according to his own rule; and it seems more fit for the Court to leave it in their hands. The decree did not direct any inquiry to be made respecting the persons who were interested, nor as to the circumstances under which their interests were or were not represented; and the only persons who had any legal authority to act as trustees were discharged, and new trustees were ordered to be appointed, but no provision was made for their being appointed in the manner directed by the will; and, notwithstanding these directions given, the Court itself, in the absence of any trustee, took upon itself to exercise the discretion which the testator intended to be exercised by the trustees. I must, therefore, declare that the plaintiff, and the other persons entitled under the trusts of the testator's will, were not bound by the decree made in the cause of *Dingwall* v. *Crombie*, on the 3rd of August 1833, or by the proceedings thereunder, and that notwithstanding that decree and those proceedings, the testator's residuary personal estate ought to be laid out in the purchase of lands in England or Scotland, according to the directions of the will, and that such parts, or so much of the funds and monies constituting the capital or parts of the capital of such residuary personal estate as were in Court in the month of November 1836, and were, under the order of the 24th of the same month of November, transferred and paid to J. D. Dingwall, were erroneously transferred and paid to him, and ought to be restored and brought back, by the defendant Sir H. Bridges, out of the assets of the said J. D. Dingwall possessed by him, and that he must be ordered to transfer and pay the same into court accordingly, and either to admit assets received by him sufficient for the purpose, or to account in the usual manner. And further declare, that the trustees, appointed in pursuance and under the direction of the decree were erroneously appointed, and that new trustees ought to be now appointed in the manner directed by the will; and thereupon refer it to the Mas-

ter to approve of trustees to be appointed by the plaintiff, as the person now entitled to the actual possession or to the actual receipt of the rents of the estates devised by the said will; and, if necessary, there must be an inquiry as to what part of the funds in court in November 1836, which were transferred and paid to J. D. Dingwall, consisted of capital, and what were the amount and particulars thereof; and, if necessary, there must be an inquiry who are the persons now living entitled in succession to these estates; and I shall proceed no further until I obtain the appointment of new trustees.

M.R. Nov. 21; Dec. 1. } BLENKINSOPP *v.* BLENKINSOPP.

Production of Papers—Privileged Communications—Admissibility of Affidavits.

In answer to a bill seeking to set aside a deed as fraudulent, &c., two of the defendants, T. and F, trustees and parties to the deed, admitted the possession of divers documents and papers relating to the matters mentioned in the bill, but did not object by their answer to produce the same as being privileged communications; T, who was a solicitor, stating generally in his answer that for a few years previously to the commencement of the plaintiff's suit in the ecclesiastical court, he was employed by the co-defendant B. as his solicitor, in matters relating to B.'s property; that he advised B. to employ a proctor to conduct his defence thereto, and that so far as B. had employed a solicitor in the suit, the defendant T. had always acted as B.'s solicitor therein. T. afterwards filed an affidavit stating more fully his employment by B. as his solicitor, with reference to the matters the subject of the present suit. An affidavit was also filed in support of the motion for the production of the different documents and papers admitted by the defendants T. and F, to be in their possession, which tended to contradict the statement that T. had been employed and acted as B.'s solicitor:—Held, that the affidavit of T. was admissible in opposition to the motion, but that the affidavit in support of it was not receivable.

This suit had been instituted in January 1846, by the wife of the defendant G. T. L. Blenkinsopp, against him and the two other defendants, who were the trustees under a voluntary trust deed executed in their favour (after the institution of proceedings by the plaintiff in the ecclesiastical court against her husband), of all his real and personal estate. A sentence of divorce was afterwards pronounced for the plaintiff against her husband, and process was issued against him for the payment of large sums of money in respect of costs and alimony. The defendants, the trustees, by their answer, admitted their possession of divers documents, papers, and writings specified in the schedule annexed to their answer, and relating to the matters stated in the bill, and they stated that they were ready and willing to act in all things relating to the matters in question in the suit as the Court should direct; they made no objection by their answer to the production of the documents. Trotter stated, in his answer, that for a few years previously to the commencement of the suit in the ecclesiastical court, he was employed by the defendant Blenkinsopp as his solicitor in matters of business relating to his property in the neighbourhood of Bishop Auckland, and that he was consulted by Blenkinsopp as to the course he should adopt in the suit, when he advised him to employ a proctor.

A motion was now made on behalf of the plaintiff, for the production of certain deeds, papers, and writings, admitted by the defendants Trotter and Fenwick to be in their possession.

Previously to the motion coming on to be heard, the defendant Trotter, by his affidavit, stated, that the third schedule to the answer of himself and Fenwick, both of whom were solicitors (though not in partnership), contained a bundle of letters written to the defendant Trotter relative to the trust, during the years 1843, 1844, 1845, 1846; also a bundle of letters relative to the suit in the ecclesiastical court, two cases and the opinions of counsel thereon, and other documents and papers also relating to the suit in the ecclesiastical court; that he was (as in his answer was stated), solicitor to the defendant Blenkinsopp in matters relating to his property, for some years prior to the proceedings in the ecclesiastical court; and that he was still such solicitor,

and was also his solicitor, so far as the defendant Blenkinsopp had a solicitor, and was consulted by him as regarded the proceedings in the ecclesiastical court; that the bundles of letters consisted of letters written to Trotter by the defendant Blenkinsopp as such his solicitor as aforesaid, and that the same were private and privileged communications made by the defendant Blenkinsopp to Trotter; that the cases were prepared by Trotter as such solicitor to the defendant Blenkinsopp, and his said trustees, and the opinions were taken by him, as such their solicitor as aforesaid, for the purpose of advising those parties with regard to the proceedings in the ecclesiastical court, and that the documents and papers relating to the cause in the ecclesiastical court were documents which came into his possession as the solicitor of the defendant Blenkinsopp. The defendants did not object to the other papers and documents being produced; and the defendant Fenwick did not, by his answer or otherwise, allege that he had ever acted as the defendant Blenkinsopp's solicitor. An affidavit was made, some days after the date of Trotter's affidavit, by the clerk of the plaintiff's solicitor, from which it appeared that the defendant Blenkinsopp (who was not a party to the motion) in his answer, repudiated the defendant Trotter as his solicitor.

Mr. Turner and *Mr. Glasse*, in support of the motion, contended, that in a case like the present, the affidavit made in support of the motion was admissible, inasmuch as it only supported and did not contradict facts stated in the bill; that Trotter in no way acted for Blenkinsopp in the ecclesiastical suit, Blenkinsopp's defence having been wholly conducted by his proctor; and in Trotter's answer it was only stated, that so far as Blenkinsopp had a solicitor, Trotter was his solicitor; that Trotter nowhere stated in his answer that the communications that passed between him and the defendant Blenkinsopp had relation to the character of solicitor and client, or that the cases were prepared and opinions taken after or with reference to the present suit, or to the confidential situation of solicitor and client. The cases of—

Taylor v. *Heming*, 4 Beav. 235; s. c. 10 Law J. Rep. (N.S.) Chanc. 369.

Addis v. *Campbell*, 1 Beav. 258; s. c. 8 Law J. Rep. (N.S.) Chanc. 305.

Ord v. *White*, 3 Beav. 357.

Taggart v. *Hewlett*, 1 Mer. 499,

were cited in support of the motion.

Mr. Kindersley, contrà, for the defendants Trotter and Fenwick, insisted that the affidavit of Trotter was clearly admissible, and must be taken to be true, although the affidavit filed in support of the motion, and which tended to contradict Trotter's answer, was not; and that the question, as regarded the deed complained of by the bill, and which was executed for the benefit of the defendant Blenkinsopp's creditors, was, whether it could prevail against the claim of the plaintiff for alimony; that in *Purcell* v. *Macnamara* (1), before Lord Eldon, where a defendant had sealed up papers, but had left the index to the papers unsealed, from which it appeared quite clear that a paper had been sealed up that had relation to the matters in question, and which, therefore, ought to have been produced; his Lordship declined to grant an application to have the sealed papers unsealed; and that the same determination was come to in *The Sheffield Canal Company* v. *the Sheffield and Rotherham Railway Company* (2).

The MASTER OF THE ROLLS, after deciding against the admissibility of the affidavit filed in support of the motion and in favour of the other affidavit, said:—The plaintiff is entitled to the assistance of the Court to enable her to make out her case, the defendant Blenkinsopp having executed the deed of September 1842 after the commencement of the proceedings against him in the ecclesiastical court, and with the view of withdrawing his property from the reach of the sentence of that Court afterwards pronounced against him. By the deed, Trotter was constituted one of the trustees of the defendant Blenkinsopp's estates, and thereby became an instrument to effect the fraud complained of by the plaintiff. It is desired on the part of the defendants to conceal the facts of the case and to be protected from their discovery, and Trotter says he ought to be protected from the

(1) Wigram on Discovery, p. 240.

(2) 1 Phil. 484; s. c. 14 Law J. Rep. (N.S.) Chanc. 25.

required discovery, because he had been previously employed by the defendant Blenkinsopp as and still was his solicitor, and was consulted by him as to what course he should adopt with reference to the suit in the ecclesiastical court, when Trotter advised the defendant Blenkinsopp to employ a proctor. Trotter could not be actually employed in the cause in the ecclesiastical court, because he was a solicitor only; his statement, however, in his answer is, that he did certain things as Blenkinsopp's solicitor, though it is very vague in its nature. In this state of things, he desires to have the opportunity of filing an affidavit, which he does file, and by it he states that he was employed as the solicitor of the defendant Blenkinsopp with relation to the proceedings in the ecclesiastical court, and particularly with reference to certain cases prepared, and the opinions of counsel thereon mentioned in the schedule to his answer. I will never make an order permitting a concealment of papers, which *primâ facie* ought to be produced; but there are rules on the whole wisely established for the purpose of forwarding the administration of justice, and it is with the view of observing those rules that I must console myself for the necessity of doing in the present case what seems to be a hardship: I must refuse the production of the papers referred to in the affidavit of Trotter; but the information sought may perhaps be obtained by means of an amendment of the bill. The papers referred to may very probably relate to the execution of the deed complained of; but I cannot, consistently with the authorities, order their production.

V.C. 1845. May 22. L.C. 1846. Nov. 6, 9. } HEMING *v.* SWINNERTON.

Arbitration—Award—Statute 9 *&* 10 *Will.* 3. *c.* 15.—*Demurrer—Jurisdiction.*

The Court of Chancery is within the provisions of the stat. 9 *&* 10 *Will.* 3. *c.* 15. *for enforcing awards; and where, by an agreement of reference, the submission may be made an order of the Court of Chancery, by either of the parties, the original jurisdiction of the Court to interfere with the award is taken away by the stat.* 9 *&* 10 *Will.* 3. *c.* 15, *whether the submission has or has not been actually made an order of the Court: and the award can only be impeached in the manner pointed out by the statute.*

This case came before the Court upon a general demurrer for want of equity. The circumstances are sufficiently stated in the judgment of the Vice Chancellor.

May 22, 1845.—The Vice Chancellor.—In this case of *Heming* v. *Swinnerton*, it appears that Swinnerton filed a bill in this court against Mr. Heming for the specific performance of an agreement, and to have a lease executed according to that agreement. An answer was put in, and then the parties, out of court, agreed to refer the whole matter; and it was a part of the agreement that the reference and award should be made a rule or order of this court. An award was made, and Mr. Heming has filed a bill to set aside the award; and he filed the bill before the award had been made a rule or order of this court; and to that bill the defendant has demurred generally.

The case is either within the statute 9 & 10 Will. 3. c. 15, or it is not. If it is within the statute, the only effect will be this: that whenever the award shall be made a rule of court, process upon it cannot be stopped by any other Court; and that will leave this Court to exercise its ancient jurisdiction uncontrouled. If it is not within the statute, there was nothing whatever to prevent this Court from exercising its ancient jurisdiction; and according to what was decided in *Lord Lonsdale* v. *Littledale* (1), and what Lord Eldon says in *Nichols* v. *Chalie* (2), where the case is not within the statute, this Court will exercise its ancient jurisdiction. Then, the only question is, whether the award is good upon the face of it. The award had directed that Mr. Heming shall pay sums of money to Swinnerton; but it has not directed, or indeed given any direction whatever upon the giving up of possession, in case of payment. The award has also directed that the bill

(1) 2 Ves. jun. 451.
(2) 14 Ibid. 268.

which was first filed shall be dismissed, with costs; but, at the same time, has directed that the defendant shall pay the costs. Again, the award has directed, that in case the money be not paid, then Swinnerton shall have a lien upon the tenements in question; but it has not directed how that lien is to be enforced or dealt with, or whether, during the time that Mr. Swinnerton is to keep possession, he is to be accountable as a person liable to pay an occupation rent, or otherwise. It therefore appears to me, that the award, on the face of it, is not mutual, is not final, and is contradictory to itself: and my opinion, therefore, is, that the demurrer must be overruled in the usual way.

The defendant appealed from that decision.

Mr. James Parker and *Mr. Daniel*, for the appellant, contended that the statute of Will. 3. had taken away the original jurisdiction of the Court, where the reference was made under that statute; and that the fact that the submission of reference had not actually been made an order of the court, was not material. In the case of *Nichols* v. *Roe* (3) the decision of the Vice Chancellor was reversed by Lord Chancellor Brougham.

Gwinett v. *Bannister*, 14 Ves. 530.

Davis v. *Getty*, 1 Sim. & Stu. 411; s. c. 1 Law J. Rep. Chanc. 209.

Mr. Rolt and *Mr. Wright*, for the plaintiff, contended that the Court of Chancery was not included as a "court of record," within the meaning of the statute of Will. 3; and that the Court of Chancery retained, in this case, all its original jurisdiction to interfere between the disputing parties—*Miles* v. *Presland* (4). As to the validity of the award, they cited—

Wilkinson v. *Page*, 1 Hare, 276; s. c. 11 Law J. Rep. (N.S.) Chanc. 193;

Marquess of Ormonde v. *Kynnersley*, 2 Sim. & Stu. 15; s. c. 2 Law J. Rep. Chanc. 178.

Mr. Parker replied.

Nov. 9.—The LORD CHANCELLOR.—I have read through this bill, to see whether there was any charge in it, which, upon demurrer, might be important to save the question of jurisdiction, and I find no passage which will have such an effect. The bill very fairly states the case; it states the disputes which had arisen between the parties—that litigation was commenced—that there had been a reference to arbitration and an award; and then it alleges certain objections to the award, that it was not final nor mutual, and other objections, being errors of the arbitrator; and it then prays that the award may be set aside, and that the party may be restrained from making the submission an order of this court. It then clearly raises the question, whether the case is within the statute, and whether this Court has jurisdiction upon bill under these circumstances, to interfere under the provisions of the statute, to protect the party against an improper award.

I am sorry that I have not been furnished with a more accurate note of the grounds upon which the Vice Chancellor's judgment rested; but I collect that he proceeded on this, that the submission had not been made an order of this Court at the time when the litigation commenced, and when the demurrer came to be argued. If that was the ground of His Honour's judgment, it reduces the question to a very narrow compass, namely, whether the decisions in the cases of *Davis* v. *Getty* and *Dawson* v. *Sadler* (5), and the case of *Nichols* v. *Roe*, as decided by Lord Brougham on appeal, are to be considered the rule of this court; or whether the opinion of the Vice Chancellor, expressed in *Nichols* v. *Roe*, was correct, where he laid it down, that if the reference had not been made a rule of this court when the bill was filed, the jurisdiction of this Court was not ousted by the statute. It is sufficient for the purpose to say, that it is not necessary to inquire into the correctness of the rule, but that it has been the established course of this Court now for a great length of time; and it was decided by Sir John Leach in two cases; and, by the report, they appear to have been affirmed by Lord Brougham. It is hardly to be expected that, after these decisions, this Court would revert back again in questions of this sort

(3) 5 Sim. 156; s. c. 3 Law J. Rep. (N.S.) Chanc. 90; 3 Myl. & K. 431.

(4) 4 Myl. & Cr. 431.

(5) 1 Sim. & Stu. 537; s. c. 2 Law J. Rep. Chanc. 80.

upon the construction to be put upon the terms of a statute. I cannot, however, see any reason to doubt the soundness of these decisions; and particularly after they have been so long established, I feel no inclination to shake the course of the Court: and therefore I am of opinion that I ought to adopt those decisions as the ground of my opinion. I think the objection good; and if that was the ground of the Vice Chancellor's judgment, I think it was erroneous, and that he ought to have adopted the principle laid down in *Nichols* v. *Roe*.

On the argument, other grounds were mentioned; and, among them, that the Court of Chancery has not jurisdiction at all in such a case as the present. This fact seems to have been the subject of doubt in former times, although I have considered it settled that the Court of Chancery has jurisdiction. But after the cases of *In re Joseph and Webster* (6), and *Pownall* v. *King* (7), where Lord Eldon actually ordered the submission to be made an order of this court, it is too late to raise the question whether this Court be or not within the construction of the statute 9 & 10 Will. 3. c. 15. In fact, as referred to in one part of the statute, the court of equity is clearly intended to be included.

The third objection was, that even if this Court was within the provisions of the act, and if the Court of Chancery had jurisdiction, there was no reason why a party should not file a bill to set aside the award. But it appears to me that the jurisdiction by bill is excluded by the statute, which clearly defines the course of proceeding; and it evidently excluded any jurisdiction except that which was provided by the statute.

I think, therefore, that the matter being within the jurisdiction of the Court of Chancery, and that being within that jurisdiction, there was, therefore, no necessity for filing a bill, but that the jurisdiction by bill is excluded by the statute, the demurrer ought to be allowed.

(6) 1 Russ. & Myl. 496.
(7) 6 Ves. 10.

L.C. Dec. 1. } CHUCK *v.* CREMER.

Irregular Order—Nullity—Attachment.

An order of the Court, which is known to a party, is not to be treated by him as a nullity, although it may have been irregularly obtained, and he has had no regular service of it, and it has not been duly entered.

A defendant obtained, by consent, an order for further time to answer, in which a longer time was allowed, by mistake, than had been agreed upon. After the day when the further time would have expired if the order had been correctly drawn up, but before the day named in the order, the plaintiff issued an attachment for default of answer. The attachment was discharged for irregularity.

In this suit the time for answering the bill expired on the 1st of June 1846; and on that day, the defendant took out a warrant, returnable on the 4th of June, to attend the Master, on an application for further time. It was arranged by the solicitors for the plaintiff and defendant, that the defendant should have a month's further time from the 1st of June; but, by a mistake of the Master's clerk, the order, which was drawn up, and dated the 4th of June, allowed a month's further time from that day. The defendant's solicitor sent a copy of this order to the plaintiff's solicitor by the post, on the 11th of June, but did not serve him with it in any other manner, nor did he cause it to be entered with the clerk of records and writs. On the 27th of June the plaintiff's solicitor sent a note to the defendant's solicitor, stating, that if the answer was not filed by the following day, the 28th of June, (being the day on which the further time would have expired, if it had been computed according to the agreement between the solicitors, from the 1st of June,) he should issue an attachment. On the 30th of June no answer having been filed, an attachment was issued. A motion was then made before the Vice Chancellor of England on the behalf of the defendant, that the attachment might be discharged; but His Honour refused the motion, with costs. The application was now renewed before the Lord Chancellor, and it was also moved that the

order of the Vice Chancellor might be discharged.

Mr. James Parker and *Mr. Daniel* in support of the motion. — The question, whether the order for further time has been drawn up consistently with the arrangement which had been entered into, is not before the Court. The order was in existence; and if it was improper in any respect, the plaintiff should have made an application to have it discharged or rectified; but he is not justified in treating it as a nullity, and taking upon himself to decide that it was irregular or erroneous — *Wilkins* v. *Stevens* (1).

Mr. Rolt and *Mr. Kinglake*, contrà.— The application for further time was made by the defendant, for his own benefit; and when his application was assented to, it was a duty, which he owed both to the Court and the plaintiff, to see that the terms of the order were in accordance with the agreement between himself and the plaintiff. He also omitted to enter the order with the clerk of records and writs, and had not served it upon the plaintiff's solicitor, except by sending it through the post, which was not good service of it; and as all the difficulty was occasioned by the irregularity of the proceedings of the defendant, he is not entitled to ask the Court to assist him in taking advantage of his own omissions. If necessary, this motion might stand over until the plaintiff can apply to have the order for further time corrected.

The Lord Chancellor (without hearing a reply) said, that, if he thought his view of this case would be affected by the plaintiff succeeding in such an application to rectify the order, he might allow the motion to stand over; but he must have very strong authority adduced before he could decide that a party who knew of the existence of an order was at liberty to treat it as a nullity, either because it was irregularly or improperly obtained, or because it had not been duly entered. It was clear that a mistake had been made: nothing was done to mislead the Master; but the order was in fact different from that which had been agreed upon. Still as it was an existing order, it was entitled to be respected, and the plaintiff was wrong in issuing an attachment while the order remained. He should, therefore, discharge the attachment; and the defendant must have the costs incurred by him in his application before the Vice Chancellor.

(1) 10 Sim. 617; s. c. 9 Law J. Rep. (N.S.) Chanc. 299.

L. C.
Dec. 11, 21. } JORDAN *v.* JONES.

Baron and Feme—Jurisdiction—Conveyance and Acknowledgment.

Where the Court has ordered a conveyance of a mortgaged estate to be executed by all necessary parties, and one of those parties is a married woman, the Court has no jurisdiction to compel her to execute the conveyance or to acknowledge it.

The defendant, Mrs. Jones, had, some time previously to her marriage, advanced some money upon a mortgage in fee of freehold hereditaments: she afterwards deposited the mortgage deed and the title deeds of the mortgaged hereditaments with the plaintiff, Mr. Jordan, to secure to him the repayment of a debt due to him from her brother. Mr. Jordan filed this bill for a sale or foreclosure, and had obtained a decree, which directed that the mortgagee's interest should be sold, and that all proper parties should join in the conveyance. The interest of the mortgagee in the mortgaged estate had been sold accordingly, and the purchaser had been let into possession, and a deed of conveyance approved by the Master; but Mrs. Jones refused to execute the conveyance. The purchaser obtained an order from Vice Chancellor Wigram that Mrs. Jones should, within four days after service of the order, execute a conveyance, and acknowledge it before a Master in Chancery, or a commissioner. A motion was now made, on her behalf, to discharge that order of the Vice Chancellor.

Mr. Cooper and *Mr. Saunders*, in support of the motion.—Since the passing of the statute 3 & 4 Will. 4. c. 74, the acknowledgment of a deed is the only mode by which a married woman can make a valid conveyance of her interest in freehold

estate; and the Court will act upon the same principle in requiring such a proceeding to be adopted as it used to observe with regard to fines before they were abolished. The voluntary consent of a married woman was essential to a fine, and is equally necessary in case of the acknowledgment of a deed. If the order of the Vice Chancellor is not complied with, the next application will be to commit Mrs. Jones to prison, under the Contempt Act, 1 Will. 4. c. 36. s. 15; and an acknowledgment extorted from her, under such circumstances, is not a compliance with the intention of the act. The Irish Contempt Act, 5 & 6 Will. 4. c. 16. s. 12, rule 12, which corresponds with rule 15. of the 15th section of the English Contempt Act, omits the words "levy a fine or suffer a recovery."

Martin v. *Mitchell*, 2 Jac. & Walk. 413.
Withers v. *Pinchard*, cited in *Morris* v. *Stephenson*, 7 Ves. 475.
Stilwell v. *Mellersh*, 4 M. & Cr. 581; s.c. 9 Law J. Rep. (N.S.) Chanc. 39.
Burke v. *Crosbie*, 1 Ball & B. 489.
Kennedy v. *Daly*, 1 Sch. & Lef. 355.
Shelford on Real Property Acts.
1 *Daniell's Chanc. Pract.* 168, 2nd edit.
5 *Cruise's Digest*, 178, 179, 4th edit. and the cases there cited.
3 *Sugden on Vend. and Purch.* 231, 11th edit. (1).

Mr. Giffard, contrà.—The Court has already ordered the conveyance to be executed by all necessary parties, and this order merely requires it to be done within a certain time. The Court will not necessarily commit Mrs. Jones to prison if she refuses to obey this order: that will be for the future consideration of the Court. The cases which are referred to, are cases where the husband has attempted to alien the real estate which belonged to the wife; and there the Court refused to compel her to deprive herself of her own property. In *Sturgis* v. *Champneys* (2), the Court even required a settlement to be made on the wife out of her real estate. In this case the Court has made a decree, under which the estate became the property of another party; and the Court will not allow her to defeat the ends of justice by refusing to join in the necessary conveyance.

Mr. Cooper, in reply, insisted, that if Mrs. Jones was a trustee for the purchaser, he might obtain a conveyance under the act of the 1 Will. 4. c. 60, but that the present order could not be supported.

The Lord Chancellor.—A married woman may be willing to do an act in order to avoid the consequences of not doing it. Many a woman has levied a fine, although she would very willingly have kept the estate. The rules as to married women are established for the purpose of protecting them against their husbands. It is new law to me that the Court has no jurisdiction over married women to compel due compliance with an order of the Court; and no case has been produced in which there is such a decision. I will not, however, decide the case till I see *Foxon* v. *Foxon*. I have no doubt that it is very improper conduct in Mrs. Jones to disobey the order of the Court. I must assume that the decree and order were made under circumstances in which she ought to execute the deed, and that what the Court has ordered to be done ought to be done with her concurrence, and she refuses to do that which is necessary to do justice to the parties. I do not say what the consequences are. I shall be very much surprised if the Court has no jurisdiction, and if when the Court has directed what ought to be done, it is to be stopped because one of the conveying parties is a married woman.

Dec. 21.—His Lordship stated that he had seen the papers in *Foxon* v. *Foxon*, and he was of opinion that the Court could not make such an order against a married woman, and that the order of Vice Chancellor Wigram must, therefore, be discharged.

(1) Mr. Cooper also mentioned to his Lordship a case of Foxon *v.* Foxon, in 1836, in which he had concurred with the Master of the Rolls, in holding that the Court had no jurisdiction to compel a ward of the Court, who had married without having her property settled upon her, to execute the settlement which the Court had ordered to be made after the marriage.

(2) 5 Myl. & Cr. 97; s.c. 9 Law J. Rep. (N.S.) Chanc. 10.

V.-C. Nov. 19. } MAITLAND v. IRVING.

Guardian and Ward—Improper Influence—Surety—Injunction.

Proceedings at law were stayed where the claim originated in obligations entered into by a young lady who had attained her majority about eighteen months previously, and who was and had been for some time residing in the house and under the care of her near connexion and late guardian; the obligations being for the sole benefit of the guardian and of the obligees, who had a common interest with him, the latter knowing the relationship in which the lady stood to the guardian, and taking no steps to ascertain whether she acted upon her free will and with full knowledge of the liability she was incurring.

This was a bill filed by the plaintiff, Ellenor Susan Jane Maitland, against John Irving, John Goldfinch Brown, and Donald Maclean, for the purpose of obtaining an injunction to restrain the defendants, Irving & Brown, from negotiating a banker's cheque and a promissory note, signed by the plaintiff, and drawn,—the cheque in favour of the defendant Brown,—and the note in favour of the two last-named defendants, and to have the cheque given up and cancelled, and the note (which was indorsed by the defendant Maclean,) either given up and cancelled, or the signature of the plaintiff erased; and also to restrain the defendants Irving & Brown from prosecuting their claims at law in respect of the cheque and note. The bill and the answer of Irving & Brown (the defendant Maclean having put in no answer) detailed at length the circumstances under which the cheque and note were given. The matters alleged on the part of the plaintiff, and admitted or stated by way of explanation on the part of the defendants, were, in substance, these:—That the wife of Maclean was the paternal aunt of the plaintiff; that the plaintiff lost her mother when she was very young; that being in infirm health, the plaintiff was, in her infancy, with the consent of her father (who had married a second time), placed under the care of Maclean and his wife, and that she still continued to reside with them; that the plaintiff's father died during her infancy in 1842; that the plaintiff was entitled to a considerable fortune, and was made a ward of the Court of Chancery, and that Maclean was appointed her guardian; that in all her affairs she had acted under the advice and guidance of Maclean, and of no other person; that, in 1846, Maclean entered into arrangements with the other defendants for the purchase of a coal trade business from them for 5,000*l.*; that on the 25th of January of that year, when the said arrangements were to be perfected and the money paid, Maclean represented to the other defendants that it would be a convenience to him if payment of the money were postponed till the 14th of February following, and that, if time were given till then, he would obtain a guarantee for payment from the plaintiff, whom he represented to be his niece and a person of large fortune; adding also, that she was perfect mistress of her own actions, and anxious to assist him on account of the relationship in which they stood together; that the proposal of Maclean was acceded to by the other defendants; and that on the 29th of the same month of January, Maclean handed to the other defendants the plaintiff's written guarantee for the payment by Maclean to them of 5,000*l.* on the 14th of February; that the 5,000*l.* was not paid on the last-mentioned day; and that actions were brought by Irving & Brown against Maclean and the plaintiff; that negotiations took place for the discontinuance of these actions, and ultimately an agreement was entered into, by virtue of which the actions were to be discontinued, and the arrangements between the several defendants for the purchase and sale respectively were to be put an end to on the terms following, viz. that Maclean should pay, when due, three promissory notes of 1,000*l.* each, for which the said J. Irving had become liable, in part performance of the said arrangements, and as a security for such payment Maclean should deposit with Irving a cheque to be drawn by the plaintiff for 3,000*l.*, and that Maclean should also pay to Irving & Brown 1,200*l.*, as a consideration for putting an end to the said arrangements, and in liquidation of all costs and expenses to which the same had given rise, and that the payment of the said 1,200*l.* should be secured by the pro-

missory note of the plaintiff, and that the said guarantee of the plaintiff should be cancelled. A cheque for 3,000*l.* was accordingly signed by the plaintiff, and duly deposited; and a promissory note for 1,200*l.* was also signed by the plaintiff and indorsed by Maclean, and handed over; and the said guarantee, which had been entered into by the plaintiff as aforesaid, was given up.

This last-mentioned cheque and note were the subject-matter of the present proceedings. The three promissory notes for 1,000*l.* each were not taken up by Maclean. The 3,000*l.* cheque was presented at the bank on which it was drawn, and dishonoured; and an application having been made to the plaintiff, to which no reply was received (the plaintiff being abroad with Maclean and his wife, as appeared from the pleadings in this suit), Irving & Brown brought an action against the plaintiff and obtained a verdict for 3,059*l.*, and thereupon sued out execution, but had obtained no benefit from it.

An injunction was obtained by the plaintiff, on filing the bill, to restrain further proceedings at law in respect of the 3,059*l.*, and to restrain the defendants, Irving & Brown, from taking legal proceedings on the promissory note.

Irving & Brown having, on putting in their answer, moved to dissolve the injunction, the plaintiff now shewed cause why it should be continued.

Mr. Bethell and *Mr. Bazalgette*, in support of the injunction, cited—

Huguenin v. *Baseley*, 14 Ves. 273.
Hatch v. *Hatch*, 9 Ibid. 292.
Archer v. *Hudson*, 7 Beav. 551; s. c. 12 Law J. Rep. (N.S.) Chanc. 483, and 13 Law J. Rep. (N.S.) Chanc. 380.

Mr. Humphry and *Mr. J. Baily*, contrà, insisted on the distinction between this case and those cited, with the exception of *Archer* v. *Hudson*, on the ground that here there was a consideration. The present cheque and note on which the plaintiff rested her claim amounted together to a much less sum than she was originally liable for under her guarantee, so that the substitution of the present for the former liability was a clear gain to the plaintiff, and therefore a consideration. They contended, that *Huguenin* v. *Baseley* and *Hatch* v. *Hatch* were, in that respect, distinguishable from the present case. *Archer* v. *Hudson*, though not distinguishable from it on *that* ground, was distinguishable from it on *this*: that in *Archer* v. *Hudson* the parties had full knowledge.

The Vice Chancellor.—I am clearly of opinion, that the injunction ought to be continued. There may not have been in the minds of Mr. Brown and Mr. Irving a knowledge of the principles which govern this Court; but it certainly strikes me as very extraordinary, that to men who were carrying on a lucrative business and men of mature age, it should have seemed quite a matter of course on the suggestion of a debtor, who himself was unable to fulfil his contract with them, that he, having a young lady residing with him, to whom he was guardian, who was possessed of a large fortune, should procure the lady to give to them, what was, in effect, an indemnity;—I say, it seems to me an extraordinary thing that these gentlemen should, as a matter of course, have at once acceded to the proposal, and without making any inquiry or taking any pains to see whether the young lady were really quite a free agent, and perfectly willing, with a full knowledge of all the circumstances, to do what the guardian said he would invite her, or propose to her, to do. It certainly does strike me as a very singular thing that at once, upon the mere suggestion of a guardian, who states to these gentlemen the circumstances respecting the ward, they should, without further inquiry, acquiesce in his proposal. The language of the answer is this: "That on the 28th of January 1846, when the said indenture was about to be executed, the said Donald Maclean stated, that it would be a convenience to him if time were given to him until the 14th of February then next for the payment of the said sum of 5,000*l.*; and that if such time were given, he would procure the guarantee of the said plaintiff for the due payment of the said sum on the 14th of February then next; and that the said Donald Maclean then stated to the effect that the said plaintiff was his niece,

and was a person of large property, and was perfect mistress of her own actions, and was anxious to assist him on account of the relationship in which they stood together; and that the said D. Maclean then also mentioned that he had been the guardian of the said plaintiff, who had attained her age of twenty-one years about a year and a half previously, and had resided with him for about a year and a half, but the said D. Maclean did not state to the defendants, nor did they, or either of them, understand or believe that the said D. Maclean had any influence or controul over the said plaintiff, or that the said plaintiff was not perfectly competent to judge of the effect of giving the said proposed guarantee." Now it seems to me a most extraordinary thing that these gentlemen, after making the admission which they do in detailed terms of the circumstances which existed with regard to D. Maclean and this young lady, should go on to affirm that he "did not state to them, nor did they, or either of them, understand or believe that Mr. Maclean had any influence or controul over the plaintiff." The proposal was that, upon his application, the plaintiff should give this guarantee to them for the benefit of Mr. Maclean. It is also to be observed, that the proposal was not merely beneficial to Mr. Maclean, but it was also beneficial to these defendants, because if Mr. Maclean really could not perform his agreement with them, and pay the money on the 14th of February, it was an advantage to them to have a guarantee; and yet they state gravely, that Mr. Maclean did not state to them, nor did they or either of them understand or believe, that Mr. Maclean had any influence or controul over the plaintiff. They must, if they had thought proper to think, have perceived that, by adopting the suggestion of Mr. Maclean, which they immediately did, they relied on the influence that Mr. Maclean had over the young lady. So the matter proceeded.

Now this case has been argued for the defendants as if it were a case in which the defendants had a sort of ground to resist the rule in equity, because of their not being volunteers. But it is to be observed, that no consideration whatever moved to the young lady; on the contrary, she was induced to do the act upon an application made to her by a person, who, if he had performed his duty, would have advised her not to do that which he applied to her to do. She is influenced by him,—allowed by him, at least, to give this very guarantee, which was a direct benefit to all the defendants themselves in the circumstances in which they then stood in relation to each other: in fact, it appears to me to be, in the abstract, this sort of case—that these defendants, knowing the defenceless situation of the young lady, and informed of it by Mr. Maclean himself, combined with Mr. Maclean in taking advantage of that situation, for the benefit of all the three defendants. My opinion is, that they must all three be considered as standing in the same situation. It is most necessary to consider the transaction in this view, because it would appear that on it rests the whole case; for what subsequently took place was nothing more than a substitution of the note and the banker's cheque for the guarantee, which had been given by the plaintiff on the 29th of January preceding. Having regard, then, to what has been the rule of this Court, namely, to view with great jealousy the exercise of any influence by persons standing in the situation of near relations, having influence over persons just attaining their age of twenty-one years, and having regard to the case as it now stands upon the answer, I cannot but think the Court is bound to interfere, to the extent, at least, of continuing the injunction.

K. Bruce, V.C. Nov. 3. } MAN *v.* RICKETTS.

Bankrupt—Assignee—Substituted Plaintiff—Revivor—Costs.

A suit was instituted by A, the assignee of a bankrupt, against B. and others, and, by a decree made in the cause, it was ordered that A. should pay certain costs to the defendants, except B, and that B. should pay them to A. A. died, and, by an order made in the cause, it was ordered that C. should be substituted as plaintiff in the place of A, and the suit prosecuted in the same manner as if C. had been originally a plaintiff therein. A writ of fi. fa., *drawn up in pursuance of the Orders of May* 1839,

issued on the application of C. against B. on behalf of these costs. On a motion to set aside the writ for irregularity,—Held, that there was no occasion for a bill of revivor, and that the writ was regular.

This suit was instituted by James Man and George Lackington, as assignees of J. B. Ricketts, a bankrupt, against T. B. Ricketts, and others, as defendants.

By a decree made in the cause, dated the 22nd of January 1844, it was ordered that the costs of the plaintiffs, Man and Lackington, and of the defendants, except T. B. Ricketts, should be taxed; that the plaintiffs should pay the costs of all the defendants, except T. B. Ricketts; and that the defendant T. B. Ricketts should pay to the plaintiffs their costs, and the amount of the costs so paid by them (1).

After the decree, Man and Lackington both died; Lackington being the survivor.

By the Bankrupt Act, 6 Geo. 4. c. 16. s. 67, it is enacted, that "whenever an assignee shall die, or a new assignee shall be chosen, no suit in equity shall be thereby abated; but the court in which such suit is depending may, upon the suggestion of such death and new choice, allow the name of the new assignee to be substituted in the place of the former; and such suit shall be prosecuted in the name of the new assignee, in the same manner as *if he had originally commenced the same.*"

By an order made in the cause, dated the 3rd of July 1844, it was ordered that "W. Turquand should be substituted in the place of G. Lackington, the surviving plaintiff, as a plaintiff in the cause; and that the same cause should be prosecuted in the name of W. Turquand in the same manner as if he *had been originally a plaintiff therein*" (2).

By the 1 & 2 Vict. c. 110. ss. 18 and 20, it is enacted that decrees in equity directing costs to be paid, should have the effect of judgments at law, and that courts of equity should have the power of framing writs to give effect to these provisions. The Orders of the 10th of May 1839 contain directions as to the practice in relation to writs of *fieri facias* for costs, and forms of writs.

(1) *Vide* 13 Law J. Rep. (N.S.) Chanc. 194.
(2) *Vide* 15 Law J. Rep, (N.S.)-Chanc. 97.

The costs directed by the decree of the 22nd of January 1844 to be taxed, were taxed, and such of them as were directed to be paid by the plaintiffs to the defendants, except T. B. Ricketts, were paid accordingly. The defendant T. B. Ricketts having declined to pay the costs ordered by the decree to be paid by him, W. Turquand procured a writ, drawn up according to the form contained in the Orders of May 1839, to be issued against him for the payment of these costs. In this writ the above proceedings and facts were fully recited, and the sums directed to be levied were ordered to be paid to W. Turquand.

A motion was now made on behalf of the defendant T. B. Ricketts, to set aside the writ, and all proceedings taken under it, for irregularity.

It was stated, on the hearing of the motion, by the clerk of records and writs, that the writ would not have been issued without satisfactory proof that the costs directed to be paid by the plaintiffs had been paid.

Mr. Serj. Manning and *Mr. Kent*, for the motion, contended that the writ was irregular, on the grounds, that the costs were directed by the decree to be paid to Man and Lackington, and by the writ they were directed to be paid to Turquand; that there ought to have been a bill of revivor; and that the act of parliament directed that the suit should be prosecuted by the new assignee in the same manner as if "he had originally commenced the same," whereas the order directed that the suit should be prosecuted by W. Turquand in the same manner as if he "had been originally made a plaintiff therein."

Mr. Hallett, for the plaintiff, was not called upon.

K. Bruce, V.C.—As to the necessity of a revivor, that objection is answered by the 67th section of the Bankrupt Act [His Honour read the section]. I do not see any objection to the writ on that ground. The order substituting Turquand has been made in the presence of the defendant, and the clerk of records and writs says, that the writ would not have been issued without proof that the costs had been paid by the plaintiffs. The words in the order certainly are, "as if he had been originally made a plaintiff;" and the words of the act are,

"as if he had originally commenced the same." No doubt the words of the act ought to be followed; but I think the words "originally commenced" cover the case, and that the words in the writ are sufficient.

Motion refused, with costs.

L.C. July 18, 22; Nov. 14. } THE ATTORNEY GENERAL *v.* MALKIN.

Will—Probate and Legacy Duty—Bequest to "Executors or Administrators" of Tenant for Life.

Personal estate was bequeathed to several persons successively for life, with remainder as one of them, who was a married woman, should appoint, and in default of appointment, "unto and for the benefit of her executors or administrators." The lady having died without making any appointment,—Held, that the trust fund formed part of her estate; and that her husband having survived her, and become entitled to it, it was liable to probate duty and legacy duty, as forming part of his estate, as well as to probate duty, as forming part of the estate of the wife.

Thomas Brand, by his will, dated the 27th of October 1813, bequeathed a sum of stock to two trustees, in trust for the testator's wife for her life, and after her death, in trust for John Addison Carr and Susannah Carr his wife, during their joint lives, and for the survivor of them during his or her life, and after the decease of the survivor, in trust, to pay the trust property to such persons as S. Carr should appoint by deed or will, and for default of appointment, to pay and apply the same unto and for the benefit of the executors or administrators of the said S. Carr; and the testator appointed his wife and J. A. Carr joint executrix and executor of his will. The testator died in 1814.

S. Carr died in November 1828, without having made any appointment, leaving one child only, Mrs. Malkin. Mr. Carr died in 1838, having appointed his daughter, Mrs. Malkin, and her husband, executrix and executor of his will; and having bequeathed all his property to her.

Mrs. Brand died in 1841, and thereupon Mrs. Malkin took out letters of administration to the estate of her mother, Mrs. Carr; and insisted, that either as such administratrix, or in the character of sole next-of-kin, she was entitled to the trust fund. On the other hand, it was contended, on behalf of the Crown, that the fund formed part of Mrs. Carr's estate, and that her husband became entitled to it upon her death, and that Mrs. Malkin could only claim it as legatee under her father's will; and that it was consequently liable to pay legacy duty, as forming part of the estate of Mr. Carr, and also to pay two probate duties, as forming part of the estate of Mrs. Carr, as well as part of the estate of her husband.

The information was heard before the Lord Chancellor, by special leave.

Mr. Romilly and *Mr. Maule* appeared in support of the information; and

Mr. Tinney and *Mr. Gardner*, for the defendants.

The questions which were raised were, whether Mrs. Carr took an absolute interest; or whether her next-of-kin became entitled to the fund; or whether her executors or administrators would take beneficially, as *personæ designatæ*.

The following cases were cited:—

Platt v. *Routh*, 3 Beav. 257; s. c. 10 Law J. Rep. (N.S.) Chanc. 131; s. c. *nom. Drake* v. *the Attorney General*, 10 Cl. & Fin. 257.
Sanders v. *Franks*, 2 Mad. 147.
Wallis v. *Taylor*, 8 Sim. 241; s. c. 6 Law J. Rep. (N.S.) Chanc. 68.
Bulmer v. *Jay*, 4 Sim. 48; s. c. 3 Myl. & K. 197.
Smith v. *Dudley*, 9 Sim. 125.
Holloway v. *Clarkson*, 2 Hare, 521.
Daniel v. *Dudley*, 1 Phil. 1.
The Duke of Marlborough v. *Lord Godolphin*, 2 Ves. sen. 61.

Nov. 14.—The Lord Chancellor, after stating the will of Mr. Brand, observed, that the question was, whether this fund ever formed part of Mrs. Carr's estate: if so, although it was merely a reversionary interest, which could never fall into possession

during the coverture, still, as Mr. Carr survived his wife, the fund would form part of his estate. The fund was limited, in default of appointment, to the executors and administrators of one of several tenants for life. *Saberton* v. *Skeels* (1), *Walter* v. *Meakin* (2), and *Daniel* v. *Dudley*, were all authorities to shew that in such a case the funds would form part of the estate of the tenant for life. In *Bulmer* v. *Jay* the decision was founded upon the particular words. In *Grafftey* v. *Humpage* (3), which was cited in *Daniel* v. *Dudley*, the Master of the Rolls assumed that a limitation to the executors, administrators, and assigns of a tenant for life, would give the property to the surviving husband; but that in the case then before his Lordship, the rights of the husband were bound by the covenant to settle his wife's property for the benefit of her next-of-kin. In all the cases where the next-of-kin of a party had been held to be entitled, there had been particular words used, by which the ordinary meaning of the expression had been controuled; but the Court should very strictly require strong evidence that the intention of the parties would be disappointed unless the departure from the ordinary construction was adopted. In the present case Mrs. Carr seemed to be the object of the testator's bounty. This apparent intention he carried out, by giving her a life interest in the property, and securing to her the power of disposing of it. This construction would be consistent with the ordinary meaning put upon these words, and also with the intention of the testator, so far as it appeared. His Lordship was, therefore, of opinion that Mr. Carr became entitled *jure mariti* to this reversionary interest of his wife, and that the fund was subjected to probate duty and legacy duty, as forming part of his estate, as well as to the duty which attached to it as forming part of the estate of his wife also.

(1) 1 Russ. & Myl. 587.

(2) 6 Sim. 148; s. c. 2 Law J. Rep. (N.S.) Chanc. 173.

(3) 1 Beav. 46; s.c. 8 Law J. Rep. (N.S.) Chanc. 98.

K. BRUCE, V.C. Nov. 17, 28. } APPERLEY v. PA

Railway Company—Provisional mittee—Demurrer—Partners—Part

A bill was filed by four sharehol a railway company, on behalf of the and the other shareholders, against t visional committee. The bill stated (other things) that the undertaking h abandoned, and stated also various improper conduct on the part of the dants, and that a sum of money h paid into court in respect of the unde and prayed that an account might b of all the expenses incurred in the p tion of the undertaking, and that the tiffs and the other shareholders m declared to be liable only to a propo the expenses properly incurred, and defendants might pay all the other e and that the funds in court might out to the plaintiffs and other share To this bill the defendants demur want of equity and for want of partie demurrer was overruled.

The bill in this case was filed persons, shareholders in the Midla Eastern Counties Railway Compan on behalf of themselves and al the shareholders, except the defe against the defendants, who were t visional committee of management company.

The bill stated the scheme for the the issue of the prospectus, and t capital was to be 1,500,000*l.* in shares of 25*l.* each.

The bill then stated that the def ought to have allotted, and coul allotted, all the shares and raised capital; but that they allotted only shares; and that, of these, 17,84 rejected; and that the total sum deposits amounted only to 47,670 that the defendants, at the date of liamentary contract, knew that the could not be carried into effect for capital; but that they went to par and that the bill passed the House mons, but was rejected by the H Lords, and finally abandoned.

The bill then stated that the 39,000*l.* had been paid into court ir

ance of the standing orders, and that the defendants intended to apply that sum in payment of the expenses incurred since the date of the parliamentary contract.

The bill then stated that, in order to comply with the standing orders, the parliamentary contract was signed by the defendants in respect of 2,550 shares, and was also signed by other persons, whose names were unknown to the plaintiffs, at the instance of the defendants, in respect of 965 shares; but that no deposits were ever paid on the 2,550 and 965 shares, and that no scrip was ever issued in respect of them.

The bill then stated that, on the 22nd of May 1846, a meeting of shareholders was convened and held, at which the plaintiffs and the other shareholders, on whose behalf they sued, voted against proceeding with the line, but that the defendants, by means of scrip certificates, which they had purchased, or caused to be held by persons under their influence, and by various undue means, procured a majority of votes in favour of proceeding, and procured a resolution to be passed for that purpose.

The bill charged that the defendants were guilty of a breach of trust in making the application to parliament, and ought not to be allowed to pay out of the deposit money any expenses incurred since the undertaking failed, and ought themselves to repay all the expenses already paid; that a rateable distribution of the expenses properly incurred ought to be made among the shareholders, in such proportion as the number of shares held by them bore to 60,000, and that the residue ought to be paid to the plaintiffs, and all others on whose behalf they sued.

The bill also charged that the number of shareholders was so great, and their rights and liabilities so subject to fluctuation by death and otherwise, that it was impossible, without the greatest inconvenience, to make them parties; and to do so would render it impossible to bring the suit to a hearing; that the interests of the shareholders, except the defendants, were identical with those of the plaintiffs, and that none of the shareholders (except the defendants) had interests adverse to or differing from those of the plaintiffs, and that all the said shareholders (other than the defendants) were fully represented by the plaintiffs, and had a common interest in obtaining the relief by the bill prayed.

The bill prayed that it might be declared that the object of the company had failed through the misconduct of the defendants, and that accounts might be taken of the sums received by the defendants, and of their application thereof, and that all monies improperly applied by them might be repaid by them; that it might be declared that the plaintiffs were only liable for such proportion of the amount properly paid as their shares bore to 60,000, and that the surplus might be paid to the plaintiffs and others on whose behalf they sued. It also prayed for an account of the money then in the hands of the defendants, and that the same might be applied in payment of the debts and expenses incurred by the company, and that the surplus might be applied in aid of the objects of the suit, and for an injunction to restrain the payment of the 39,000*l.* out of court.

To this bill the defendants demurred for want of equity and for want of parties.

Mr. Russell and *Mr. Speed*, for the demurrer, contended, that this was a bill for a dissolution of a partnership, and that all the shareholders, as being partners, ought to be parties to the bill. They also contended, that the bill in its present shape was defective, in consequence of the circumstances alleged in the bill, as to the subscription of the 965 shares by persons unknown to the plaintiffs, and as to the meeting of the 22nd of May 1846. They cited—

Cockburn v. *Thompson*, 16 Ves. 321.
Pearce v. *Piper*, 17 Ibid. 1.
Van Sandau v. *Moore*, 1 Russ. 441; s. c. 4 Law J. Rep. Chanc. 177.
Gray v. *Chaplin*, 2 Sim. & Stu. 267; s. c. 3 Law J. Rep. Chanc. 161.
Hichens v. *Congreve*, 4 Russ. 562; s. c. 6 Law J. Rep. Chanc. 167.
Small v. *Attwood*, You. 407.
Long v. *Yonge*, 2 Sim. 369.
Walburn v. *Ingilby*, 1 Myl. & K. 61; s. c. 3 Law J. Rep. (N.S.) Chanc. 21.
Jacob v. *Lucas*, 1 Beav. 436; s. c. 8 Law J. Rep. (N.S.) Chanc. 271.
Taylor v. *Salmon*, 4 Myl. & Cr. 134.
Walworth v. *Holt*, Ibid. 619; s. c. 10 Law J. Rep. (N.S.) Chanc. 138.
Richardson v. *Larpent*, 2 You. & Col. C.C. 507.

Lund v. *Blanshard*, 4 Hare, 9; s. c. 14 Law J. Rep. (N.S.) Chanc. 332.

They relied particularly on—

Evans v. *Stokes*, 1 Keen, 24; s. c. 5 Law J. Rep. (N.S.) Chanc. 129; and

Richardson v. *Hastings*, 7 Beav. 301, 323; s. c. 13 Law J. Rep. (N.S.) Chanc. 129, 142.

Mr. Rolt and *Mr. W. T. S. Daniel*, for the bill, were not called upon.

KNIGHT BRUCE, V.C., in the course of the argument, expressed a strong opinion against the demurrer.—He said, that if the argument of the defendants should prevail, it would be impossible that the suit could go on. The law allowed such partnerships to be formed, and allowed them to be dissolved; and it would be singular if the law were to lay down rules respecting the method of effecting a dissolution, which would render it impossible to carry it out—it would be singular if the law were to give the right but not the remedy. He would, however, look through the bill before giving his final opinion.

On a subsequent day the following written decision was given to the parties:—Since the cause was argued on behalf of the defendants, I have read the brief of the bill furnished to me, and a copy of the demurrer. Having considered them, I continue to be of opinion that the bill states a case for equitable relief, and that it contains allegations and charges which, upon principle, and upon the preponderance at least of authority, are sufficient to sustain it against a demurrer for want of parties. I consider myself bound to overrule the demurrer. I think that it should be overruled in the ordinary way; but that the defendants should have six weeks' time to answer. If the plaintiffs object to the defendants having that time, I will hear counsel upon the question.

WIGRAM, V.C. Dec. 15, 16, 18. } WORLEY *v.* FRAMPTON.

Trustee—Covenants—Renewal of Lease.

On a bill for specific performance of an agreement entered into by the testator to grant a lease to the plaintiff of certain premises for twenty-one years, which lease was to contain a covenant for the renewal of the lease for two further successive terms of twenty-one years each,—Held, that a devisee in trust, who had no beneficial interest, could not be compelled to enter into any covenant for renewal of the lease, nor to enter into any other than the usual trustee's covenant, that he had done no act to encumber.

By articles of agreement, dated the 23rd of November 1832, made between J. A. Frampton of the one part, and William Worley of the other part, reciting that J. A. Frampton was seised of the piece of ground thereinafter described, for an estate of inheritance in fee simple, according to the custom of the manor of Haringay, otherwise Hornsey, and that J. A. Frampton had agreed to grant a building lease of the said piece of ground unto W. Worley for a term of sixty-three years, to commence from the 24th day of June 1831, at the rent of a peppercorn for the first year of the said term, and the annual rent of 10*l.* for the remainder thereof; but that the custom of the said manor not authorizing a lease for a longer term than twenty-one years, it was agreed that J. A. Frampton should make a lease for twenty-one years, accordingly, with a covenant for renewal, as thereinafter mentioned,—it was witnessed that, in consideration of W. Worley having agreed to take such lease upon the terms and conditions therein mentioned, the said J. A. Frampton, for himself, his heirs and assigns, covenanted with W. Worley, his executors, administrators, and assigns, that he, J. A. Frampton, his heirs and assigns, should prepare and execute unto the said W. Worley, his executors, administrators, and assigns, a good and effectual lease of all that piece of copyhold land, &c. (describing the premises) for the term of twenty-one years, from the 24th of June 1831, at the rent of a peppercorn for the first year of the said term, and at the annual rent of 10*l.* for the residue thereof; and W. Worley, for himself, his executors, administrators, and assigns, agreed to accept the said lease, and to execute a counterpart thereof.

The agreement then went on to provide, that the lease to be granted should contain a covenant on the part of the lessee, his executors, &c., to build a dwelling-house on the land to be demised, of a certain value, and

within a certain time, &c.; and should contain a covenant on the part of the lessor for quiet enjoyment during the said term; and also a covenant for the renewal of the lease for two further successive terms of twenty-one years; so that the lessee, his executors, &c. might enjoy the said piece of ground for the full term of sixty-three years; and that the necessary licences to demise should be procured, from time to time, by and at the expense of the lessor, his heirs and assigns, and that the leases should be prepared by the solicitor of J. A. Frampton, his heirs and assigns, at the joint expense of J. A. Frampton and W. Worley, their heirs, executors, administrators and assigns.

Shortly after the date of the agreement, W. Worley entered into possession of the land, and built a house, and laid out the grounds, according to the terms of the agreement. In September 1836, J. A. Frampton died, without having executed a lease according to the terms of the agreement, and having, by his will devised the premises in question to trustees (whom he also appointed his executors), and of whom the defendant, W. H. Frampton, was one. The other trustees having renounced probate, and disclaimed the trusts of the will, the defendant alone proved the same, and was duly admitted tenant on the court rolls of the premises in question.

W. Worley died in January 1837, and by his will bequeathed the premises comprised in the agreement, together with the house erected thereon, to his daughter Rebecca F., for her sole use; and appointed his son, John Worley, and his son-in-law, T. F, executors of his will. The bill was filed by the executors of W. Worley and by his daughter Rebecca, against W. H. Frampton; and it prayed a specific performance of the agreement, and for a reference to the Master to approve of a proper lease, according to the terms of the agreement; and that the defendant might be decreed to execute such lease. The defendant, by his answer, submitted that, being merely a trustee, he was only bound to covenant against his own acts, and that he ought not to be compelled to execute a lease containing such covenants for renewal.

A decree having been made for specific performance, and a reference having been directed to the Master to settle the terms of the lease, the Master, at the instance of the plaintiffs, proposed to insert in the lease the following covenant on the part of the defendant, the trustee:—"And the said W. H. Frampton, in pursuance of the said stipulation in the said recited articles of agreement contained, for the insertion in the lease to be granted in pursuance thereof, of such covenant for renewal thereof, as therein mentioned, and for the purpose of effectually binding at law the reversion of the said premises, and the said W. H. Frampton and his heirs, in respect of such reversion (whilst he or they shall be legally seised thereof), and also the assigns of the said reversion from time to time, but not further or otherwise, and not so as to bind the said W. H. Frampton, or his heirs, after he or they shall have parted with such reversion, with the said covenant for renewal, doth, for himself, his heirs and assigns, covenant, promise, and agree with and to the said T. F., his executors, administrators, and assigns, that he, the said W. H. Frampton, his heirs and assigns, shall and will, at the expiration of the said term of twenty-one years hereby granted, at his or their own expense, procure from the lord of the manor the necessary licence to demise the said premises for the further term of twenty-one years; and shall and will, in pursuance of such licence, at the joint expense of the said W. H. Frampton, his heirs or assigns, and of the said T. F, his executors, administrators, and assigns, accordingly grant a renewed lease of these premises unto the said T. F, his executors, administrators, and assigns, for the further term of twenty-one years, to commence from the expiration of the said term hereby granted, at the like yearly rent of 10*l.*, and under and subject to the like covenants and agreements on the lessee's part to those on his part herein contained; with a like covenant by the said W. H. Frampton, his heirs, and assigns, for obtaining at his or their expense, at the expiration of the said further term of twenty-one years, a further licence from the lord of the manor to demise the said premises for a further term of twenty-one years; and also for granting, at such joint expense aforesaid, a second renewed lease of the said premises for the said further term of twenty-one years, at the like yearly rent, and under

and subject to the like covenants to the rents and covenants respectively herein reserved and contained, except the said covenant for renewal, in order that by means of these presents and the said two renewed leases respectively, the said T. F, his executors, administrators and assigns, may have and enjoy the said premises for the said term of sixty-three years, according to the said recited articles: provided always, and it is hereby agreed and declared, that the said last-mentioned covenant by the said W. H. Frampton is meant and intended only to bind the reversion of the said premises hereby demised, and the said W. H. Frampton, his heirs and assigns, in respect thereof, and that he or they shall be liable to an action of damages for breach of the covenant as owner of the said reversion, but not further or otherwise."

The defendant excepted to the Master's report; and, upon the hearing of the exceptions,—

Mr. Humphrey and *Mr. Faber*, for the exceptions, insisted that the defendant, being a trustee with no beneficial interest, was not bound to enter into any covenant, except as against his own acts; that the Court had never compelled a trustee to enter into such prospective covenants, for a breach of which he might be liable; and that the plaintiffs were bound to rely upon their equitable rights; and they cited—

4 *Cruise's Digest*, tit. 32. c. 26. s. 84, edit. 1835.

2 *Sugd. Vendor and Purchaser*, p. 452, edit. 10.

Willingham v. *Joyce*, 3 Ves. 168.

Powell v. *Lloyd*, 2 You. & Jer. 372.

Copper Miners' Company v. *Breach*, before Sir John Leach (not reported).

Mr. Romilly and *Mr. Nevinson*, for the plaintiffs, contended that they were entitled to be put into the same position as if the agreement had been specifically performed in the testator's lifetime; whereas, if this covenant were not to be inserted in the lease, the plaintiff would only obtain a lease for twenty-one years, with an equitable right to further renewals; and they cited *Page* v. *Broom* (1); but they submitted to take the lease without such covenants if the Court should be of opinion that they were not entitled to them.

(1) 3 Beav. 36.

Dec. 18.—WIGRAM, V.C. (after stati facts of the case).—The effect of this cove if entered into, it was said, would be t the land, and give the party the best interest he can now have in the pro But the defendant objects to the insert this covenant in the lease; and the question is, whether I can compel trustee to enter into any but the usual nants for his own acts. It is admitte the plaintiff would have had a good able title without this covenant; b plaintiff says that this is not sufficie must be distinctly understood as not any opinion how I should have deal the case if the plaintiff had desired discharged from the contract rather not have this covenant; that is, h should have dealt with the case i Frampton had been the plaintiff dec to enter into the proposed covenant Worley, as defendant, had asked to b charged, unless the covenants were e into. But Worley does not, however to be discharged, but he says that h take the lease with the equitable title if he shall not be entitled to the cove and the question is, whether I can c a bare trustee to enter into this cov Why the trustee should have declined ing into this covenant, is not a qu into which I am at liberty to ente certainly appears to be as harmless a nant as can be; for the fine is only 7 10*l.* a year is the rent reserved; an yond all dispute, the covenant woul the land, and not have hurt the t The question is, whether I can com trustee to enter into any but the trustee's covenants. It seems to m according to the established practice, not compel him to do so. The c *Page* v. *Broom* is clearly distinguishabl this case, as are also the other cases are referred to. I regret exceeding the plaintiff should not have the of the covenants. I almost hope it given as a matter of favour; but I t cannot compel the trustee to enter in such covenant. The exception, the must be allowed, and there must be a ence back to the Master to revi report.

L.C. Nov. 3. } *In re* ROBSON AND AINSLIE.

Petition of Right—Issuing of Commission—Notice to Attorney General.

Where a petition of right has received the usual royal indorsement, "Let right be done," a commission will not be issued without notice of the application being given to the Attorney General.

A petition of right had been presented, and had received the Queen's indorsement in the usual form, "Let right be done."

The petitioners now applied for a commission to inquire into the truth of the statements contained in their petition of right. No notice of the application had been served upon the Attorney General.

Mr. Anstey appeared in support of the application.

The LORD CHANCELLOR declined to make an order for the issuing of a commission, until notice of application had been given to the Attorney General.

WIGRAM, V.C. Nov. 14, 16, 17, 18, 25. } BLAIR *v.* BROMLEY.

Partners—Fraud—Liability of an Innocent Partner—Statute of Limitations.

The plaintiffs, the executors and trustees of a testator, in 1829, *employed A. & B, a firm of solicitors, to procure investments for the assets of their testator. A. wrote to the plaintiffs, naming one S. as a proposed mortgagor, for* 4,500*l.* *on the security of freehold property, whereupon the plaintiffs forwarded to A. a cheque for* 4,500*l.* *to be so invested, which cheque was paid into a bank to the partnership account. The necessary mortgage deeds were prepared, but S. afterwards declined to complete the transaction. In April* 1830, *A. wrote to the plaintiffs, giving a list of the securities upon which he alleged that the testator's assets were invested, and, amongst others, stated, "S.'s mortgage* 4,500*l.*, *3rd October* 1829." *In* 1834 *A. & B. dissolved partnership, and the plaintiffs continued to employ A. as their solicitor, who regularly paid interest on the* 4,500*l.* *down to* 1841. *A. became bankrupt in* 1844, *and the plaintiffs then first discovered that the mortgage to S. had never been effected. On bill by the plaintiffs against B. to recover this sum,—Held, that the fraudulent representation of A. must be taken to be the act of the firm; and the money being received by the partnership and lost to the plaintiffs in consequence of the fraud, which was first discovered within six years before the filing of the bill, the plaintiffs were entitled in equity to recover the money from B, the innocent partner, notwithstanding the dissolution of the partnership in* 1834, *and the subsequent adoption of A. by the plaintiffs as their solicitor, the plaintiffs being without remedy at law by reason of the Statute of Limitations.*

William T. Blair and Thomas Blair, the plaintiffs in this case, were the executors of Thomas Blair, deceased, and being desirous of investing part of the testator's estate on mortgage, directed their solicitors, Messrs. W. Bromley & Joseph W. Bromley, who were then in partnership together, to look out for securities. W. Bromley, in 1829, wrote to W. T. Blair, mentioning a Mr. Seabrook as the proposed mortgagor for 4,500*l.* on the security of certain real property. It appeared that W. Bromley, who alone managed this transaction, procured the abstract of the proposed security, and the draft of the mortgage was prepared by counsel, and the ingrossment sent down to W. T. Blair, who was then residing at Ilfracombe, who returned them to W. Bromley, inquiring when it would be necessary to forward the cheque for 4,500*l.*, and what banker's name he should write across it. On the 29th of September 1829, W. T. Blair forwarded to W. Bromley, in a letter, a cheque for 4,500*l.*, dated London, the 1st of October 1829, and drawn upon the Bank of England, in favour of Mr. Seabrook, and crossed with the name of Rogers & Co. It appeared that at that date there was standing, at the Bank of England, to the credit of W. T. Blair alone, a large sum of money, which was composed partly of the testator's assets and partly of the proper monies of W. T. Blair. Rogers & Co. were the bankers of the Messrs. Bromley, and Mr. Seabrook had never had any account there. It was in evidence that, on the 2nd of October 1829, Rogers &

Co. had received the sum of 4,500*l.* from the Bank of England, and on the same day the partnership account of Messrs. Bromley was credited by Rogers & Co. with the same sum; and the same sum was also entered in the pass-book of the firm. It appeared also that the mortgage transaction with Seabrook was never completed; but in April 1830, W. Bromley, in a letter to W. T. Blair, professing to give "a list of the sums advanced on account of your late father's estate," inserted this item, "Seabrook's mortgage 4,500*l.*, the 3rd of October 1829." In 1834, the Messrs. Bromley dissolved partnership, and in 1844, W. Bromley became bankrupt. It appeared that W. Bromley paid interest on the 4,500*l.* down to 1841, and that the non-existence of the mortgage was not discovered by the plaintiffs till shortly before the bankruptcy of W. Bromley. The present suit was instituted by the plaintiffs, alleging that the 4,500*l.* remitted to the Messrs. Bromley was part of the assets of the testator, and praying that J. W. Bromley might be declared liable to make good the same, on the ground that the money was received by the partnership, and that the fraudulent representations of W. Bromley as to the investment of the money upon Seabrook's mortgage must be taken to be the act of the firm; and that, in consequence of the fraud, the Statute of Limitations would be no bar to the recovery of the money. It was admitted, at the hearing, that the defendant was altogether ignorant of the fraud committed by his late partner. An objection was taken by the defendant to the reception of the cheque in evidence, on the ground that as it was drawn at Ilfracombe on the 29th of September, and was dated London, 1st October, it required a stamp, and that it must be taken to have "issued" the moment it was parted with by the drawer. For the plaintiffs it was argued, that the cheque could not be said to have issued so long as the drawer had dominion over it, that is, until it passed from the hands of his agent. The point was reserved, but ultimately it did not become necessary to decide it.

Mr. Bethell, *Mr. Wood*, and *Mr. Prendergast*, for the plaintiffs.—Where money is intrusted to a firm of solicitors to be employed by them in the ordinary course of their business, and a loss is occa by the fraud of one of the partne whole firm is liable to make that loss g *Willet* v. *Chambers* (1), *Marsh* v. *K* (2), *Sadler* v. *Lee* (3), *Brydges* v. *B* (4), even where no profit has accru the partnership—*Bond* v. *Gibson* (5). plaintiffs have been guilty of no laches, non-existence of the mortgage was n covered till within a short time of the ruptcy of W. Bromley; and the Sta Limitations cannot be pleaded by of the dissolution of the partnership, the transaction, in respect of whic claim is made, took place during th tinuance of the partnership—*Ault* v. *rich* (6), *Way v. Bassett* (7). In ca fraud a court of equity has concurrent diction with the courts of law—*C Woollaston* (8), *The Corporation of C* v. *Wilson* (9), *Blain* v. *Agar* (10). independently of the question of frau was a transaction between principa agent.

Mr. Romilly, *Mr. Bacon*, and *Mr.* for the defendant.—It has never bee cided that fraud is a bar to the operat the Statute of Limitations; but the to be found in the cases of *Brown* v. *H* (11), *Whitehead* v. *Howard* (12), and *E Holbech* (13), contemplate the case of r obtained by fraud, and not the case misapplication of money which has rightfully received. In the latter ca cause of action accrues as soon as the n is misapplied, and so the statute is both at law and in equity; for equit not by analogy, but in obedience t statute—*Hovenden* v. *Lord Annesley* The Court will not allow the party of the fraud to set up the statute, be

(1) Cowp. 814.
(2) 8 Bli. 651; s. c. 2 Cl. & Fin. 250.
(3) 6 Beav. 324; s. c. 12 Law J. Rep. Chanc. 407.
(4) 12 Sim. 369; s. c. 11 Law J. Rep. Chanc. 249.
(5) 1 Campb. 185.
(6) 4 Russ. 430.
(7) 5 Hare, 55; s. c. 15 Law J. Rep. Chanc. 1.
(8) 2 P. Wms. 154.
(9) 13 Ves. 276.
(10) 1 Sim. 37; s. c. 5 Law J. Rep. Chan
(11) 4 Moo. 508; s. c. 2 Brod. & Bing. 7
(12) 5 Moo. 105; s. c. 2 Brod. & Bing. 3
(13) Doug. 654.
(14) 2 Sch. & Lef. 629.

conscience is affected; but that reason ll not apply to a party charged merely th constructive fraud—*Beckford* v. *Wade* 5); he is liable merely as a debtor in pect of the receipt of the money. But plaintiffs have been guilty of such laches t the Court will not assist them—*Roberts Tunstall* (16), *Gregory* v. *Gregory* (17). pecially after the partnership has been solved for ten years before the filing of bill, and the plaintiffs ever since have pted W. Bromley as their debtor. The per remedy for the plaintiffs is at law—*Atkinson* v. *Henderson* (18). This is not a e of mutual accounts; and the fact of sting a person with money to pay over a third party does not make that person rustee—*Diswiddie* v. *Bailey* (19). In aree v. *Creswick* (20), there would have n no relief in equity if it had not been the accountable receipts—*Mackenzie* v. *Ruston* (21), *Massey* v. *Banner* (22).

Mr. Bethell, in reply.—The only case which fraud is not relieved against in uity is the case of fraud in obtaining a ll—1 *Fonbl. Eq.* p. 68. n. (*u*); 1 *Story's* r. *Jur.* p. 160. A court of equity has concurrent jurisdiction with a court of law, en though the case be one of pure personal fraud — *Colt* v. *Woollaston*, *Blain* *Agar*, *Green* v. *Bennett* (23), *Evans* *Bicknell* (24), *Burrowes* v. *Lock* (25); d time will only run from the discovery the fraud—*Hovenden* v. *Lord Annesley*. to the remedy at law, if the party is liged to sue *ex contractu*, he is barred by ne; but if he can sue for a tort, he is not rred: and this distinction will explain e cases cited by the other side. But a urt of equity recognizes no such distinction as to the remedy. But suppose there no remedy at law; the lapse of time has een produced by the concealment of the fraud until the remedy at law is lost. In such a case this Court will give relief, even if the subject-matter of the suit would not have been in the first instance proper for equity—*Pulteney* v. *Warren* (26), *Grant* v. *Grant* (27). But there is here a fiduciary character; and the injury results not merely from the breach of trust, but from the false representations of the party employed to his employer; and that alone would bring the case within the jurisdiction of equity: and one partner is liable for the acts of the other done in the course of the business of the firm.

WIGRAM, V.C. — The first duty the plaintiffs have to perform is to charge the defendant with a liability for the money, and the only evidence by which the defendant is charged in the first instance (excluding the cheque) is by a correspondence passing between William Thomas Blair and William Bromley, in which mention is made of investing part of the testator's estate, and which correspondence ultimately results in this, that a proposal is made, on the part of W. Bromley, and acceded to on the part of W. T. Blair, for investing 4,500*l.*, part of the testator's estate, on the mortgage to Mr. Seabrook. It appears that the arrangements having been made for making this investment, W. T. Blair writes to W. Bromley, and asks him the name of the bankers to be written across the cheque for 4,500*l.*, which is to be remitted to W. Bromley for the purpose of completing that transaction. I omit the cheque for the 4,500*l.* which is promised. It appears that at this time there was 16,000*l.* standing at the Bank of England in the name of W. T. Blair,—there being in fact two executors, W. T. Blair and Thomas Blair,—and this 16,000*l.* was now standing in the name of W. T. Blair alone, and therefore, *primâ facie*, not ear-marked as the property of the testator. It appears that on a given day a sum of 4,500*l.*, part of the 16,000*l.*, was drawn out, and W. T. Blair was debited with the amount of that sum. The clerk at the Bank of England says, "that from looking at the books, he is enabled to say, that the 4,500*l.* so drawn out was paid to Rogers & Co., who were the bankers of

(15) 17 Ves. 97.
(16) 4 Hare, 261; s. c. 14 Law J. Rep. (N.S.) Chanc. 184.
(17) Jac. 631.
(18) 1 Myl. & K. 582; s. c. 2 Law J. Rep. (N.S.) Chanc. 191.
(19) 6 Ves. 136.
(20) 2 Hare, 286; s. c. 12 Law J. Rep. (N.S.) Chanc. 251.
(21) 4 Mad. 373.
(22) Ibid. 413.
(23) 1 Sim. 45; s. c. 5 Law J. Rep. Chanc. 6.
(24) 6 Ves. 174.
(25) 10 Ibid. 470.
(26) 6 Ves. 73.
(27) 3 Russ. 598; s. c. 5 Law J. Rep. Chanc. 145.

the firm of the Bromleys," and it appears that at this time,—in fact, that on the same day, Rogers & Co. do receive a sum of 4,500*l.*, which is carried by them to the credit of the firm of the Bromleys. A subsequent correspondence takes place, in which W. Bromley does in his own name, but in fact on the behalf of the firm, state that the 4,500*l.* has been invested on Seabrook's mortgage, in the manner which had been previously arranged. Leaving out the cheque, I think that is all the evidence the plaintiffs have to charge them. It appears to me that is quite enough. I confess it appears to me, as it has from the beginning, that it is impossible on these facts not to assume that the 4,500*l.* credited to the firm at Rogers & Co.'s was the 4,500*l.* derived from W. T. Blair, as part of the estate of the testator. It might have been material for the defendant, probably in some view of the case, to have contradicted that, but he has examined W. Bromley as a witness for himself; and though he is examined, he being the party who knew the whole of the transaction, no attempt is made by his evidence to contradict the inference which those facts appear to me necessarily to furnish. It appears to me, *primâ facie*, without saying to what estate the 4,500*l.* belongs, that I should charge the firm with the receipt of so much money from W. T. Blair.

Now, it was said, that if this money was not proved to be part of the estate of the testator, this bill would be defective in form; because T. Blair is made a plaintiff on the supposition that the money was part of the estate of the testator, and if the money is not part of the estate of the testator, he, T. Blair, has no interest in the question. Now, I need not in this case decide that point: it appears to me to be immaterial whether that is so or not, for the purpose of this suit; because, though where that objection is taken *in limine*, the Court will not allow a party who has no interest to sue jointly with one who has; and though the same principle might, perhaps, apply even at the time of the hearing of the cause, if the Court saw injustice would follow from it, yet, when the Court has to make a general decree at the hearing of the cause, the very ground of saying that a party not interested shall not sue jointly with one who is, does not necessarily apply; and there possibly might be a case in which, if it were necessary to decide, the Court, rather than allow a suit to fail on a ground of form of that kind, might be able to get over the difficulty. But the truth is, independently of the two letters referred to, which fix the firm with knowledge that this money, 4,500*l.*, was part of the estate, I apprehend it is enough to say, that W. T. Blair, who is the party to whom the money would belong if it were not part of the testator's estate,—W. T. Blair as co-plaintiff in the suit together with Thomas Blair, states in point of fact, that it is not the money of him, W. T. Blair, but is money belonging to the estate. That statement by him would be enough to maintain the suit to recover the money, which, when recovered, would belong to the estate. And there is the authority of the case of *Ryan* v. *Anderson* (28), where it has been decided that, when the parties join in stating that each has an interest, it is not necessary for the purposes of the decree, that the plaintiffs should go into evidence as between each other, no issue being joined, for the purpose of shewing they have not that kind of interest which would clearly belong to one of them if there was no such joint interest. I am sure that on that ground there is no reason why the Court should not give relief in this suit. I think the firm were charged in the month of October 1829 with the receipt of 4,500*l.*

Then comes the question of discharge, and the way the case appears to me to stand is this:—I will suppose the bill to have been put in this simple form, that the 4,500*l.* was paid to the Bromleys for the purpose of being invested; that in point of fact, Seabrook had refused to complete the transaction, and the money had ever since remained in the hands of the firm. Then, in that view of the case, the firm being once charged would, of course, continue liable till the money had been discharged, or in some way had been applied to the plaintiffs' use. In that view of the case, it would become material to inquire whether there had been any acknowledgment by the firm, that would prevent the application of the Statute of Limitations; because, the money having been paid to

(28) 3 Mad. 174.

the firm in October 1829, unless the liability is kept alive in the simple case I have put, it would have been discharged by the operation of the Statute of Limitations. It appeared to me, therefore, material, with a view to avoid all difficulty, that I should know down to what time the acknowledgment was continued; and if, upon looking at those documents, it appears that the liability of the firm was acknowledged by the act of either of the partners, by the payment of interest, or by any writing down to the year 1839, I think then there will be no difficulty; because that will alone prevent the application of the statute, and that liability will enable the plaintiffs to obtain relief, subject only to the question whether in that simple case, there being no fraud, the proceeding ought not to have been at law instead of equity.

In order to try whether I am right in that view of the case, I suppose, first, that there was no dissolution of the partnership; then there will be no question at law to arise upon it. Then, suppose a dissolution, but no specific employment of W. Bromley, by the executors of the testator, after the dissolution, there would in that case, I apprehend, be no doubt of the continuing liability; because the mere fact, that parties do not choose to continue in partnership would not discharge either of them from that liability contracted by the joint receipt at a preceding period; the application of the statute being prevented by the payment of interest, or other acknowledgment of the liability of the firm.

Then, the remaining question would be, whether the subsequent dealing between the executors of the testator and W. Bromley alone would have any effect in discharging the defendant. It appears to me, it would have no such effect. It is quite true, that in the case of *Thompson* v. *Percival* (29), and other cases, the doctrine which was laid down in the case of *David* v. *Ellice* (30), has been altered, but that is on the ground of a presumed contract to discharge one party by treating the other as creditor. There can be no such ground where there has been one single transaction, which has been continued simply by the payment of interest, according to the tenour of the original contract between the parties. Therefore, in no case would there be a good discharge. The only question would be, whether the relief is in equity or at law: supposing it to be a case, *primâ facie*, for law and not for equity, then the plaintiffs must get over that difficulty by shewing the case is brought within the jurisdiction of this Court on some peculiar grounds, and that the ground relied on is fraud or misrepresentation of some kind or other; because, whether it is put on the general ground of fraud, or whether it is fraud in an agent, a person standing in the situation of attorney or agent of any kind, makes no difference; the misrepresentation in both cases is made the gist of the complaint.

In this case, I never have doubted for one moment, that if this bill had been filed against W. Bromley, W. Bromley might have been charged in this court; because, in that view of the case, I should impute to W. Bromley that the misrepresentation he made at the beginning of the transaction, had been continued by him from time to time down to the day the fraud was discovered: there would be both *suppressio veri* and *suggestio falsi*; and the case would be one that would fall within the common jurisdiction of the Court in cases of that nature. But the case as opened at the bar, and as I understand it on the pleadings, is this, not that W. Bromley, when he first made the suggestion of investing this money on Seabrook's mortgage, was not really negotiating for the mortgage with Seabrook, not that he had any original fraudulent purpose or intention, but that it was opened as a regular transaction. It appears that the firm went through the regular form of preparing the mortgage: the abstract was sent, the case was presented to counsel, who advised upon it, the conveyance was prepared, and it was afterwards that Mr. Seabrook, on some ground or other, refused to complete the transaction. In that view of the case, there was no original fraud, and the only ground of charging the firm originally was the actual receipt of the money, —the consequence of which I have already suggested. If the case had remained in that way, there would be nothing to add to the case which I have before observed upon;

(29) 5 B. & Ad. 925; s. c. 3 Law J. Rep. (N.S.) K.B. 98.

(30) 5 B. & C. 196; s. c. 4 Law J. Rep. K.B. 125.

but it turns out that W. Bromley did represent that that mortgage, which, in point of fact, had not been obtained, had been obtained: as I said before, I consider him as repeating that fraudulent representation down to the last moment.

Then comes the case of an innocent party: and if the jurisdiction of the Court is to be founded solely on the ground of fraud, the question is, whether—the defendant in this case, who originally is charged simply by means of the receipt of the money, the only question being whether the remedy is at law or equity,—the fraudulent representation made by W. Bromley will make the defendant liable in this court, supposing he would not otherwise be so liable. I do not mean to give any opinion upon it. It may be quite a clear point when I come to consider the pleadings; but it does appear to me there may be a case in which, the only question being as to the court in which the remedy is to be pursued, it may be that one partner will be liable for a fraud, on the ground of misrepresentation, but the other partner, who is originally charged, not on the ground of fraud, but simply upon the receipt of the money, may remain in the same position as to his liabilities as to the court in which he is to account, as if those misrepresentations had not been made. I do not mean to question the soundness (indeed, I could not with propriety do so,) of those decisions which Mr. Bethell has referred to, in which it is held, that the act of one partner done in the regular business of the firm shall be binding on his co-partner, and that may apply very well in the case of a fraudulent misrepresentation.

Nov. 25.—Wigram, V.C.—At the conclusion of the argument in this case, I stated my opinion to be,—an opinion to which I still adhere,—that I must decide on the liability of the defendant Bromley, upon the assumption that the 4,500*l.*, which is the subject of the suit, came into the hands of the defendant's firm without fraud, and that the firm was originally chargeable with it in respect only of the receipt of the money, and that the only question is, whether the fraudulent acts of the defendant's partner are to be deemed and taken as the acts of the firm, regard being had to this, that the Statute of Limitations is a bar to the against the defendant personally, unle acts of W. Bromley are to be deeme taken as the acts of the firm.

Now, my opinion is, that the false sentation first made by W. Bromley the mortgage intended to have been cuted by Seabrook was executed by (whenever and by whatever means th presentation was made,) must be de and taken as the representation of the The receipt of the money, for the pu of effecting the mortgage, was undoul the receipt of the firm.

Upon the evidence in the case, an principles of courts of justice, whatev fact may be, I must impute to the dant in this case a knowledge of that re and of the purpose for which the r was received. In this state of things the duty of each partner to see tha mortgage was executed, and unquestio the information given to the proposed gagees, that the mortgage was executed a representation within the scope of the which they had undertaken. I canno short of the conclusion, that if the firm employed an agent to do the work fo firm, the representation in question have been the representation of the and I cannot view the case less favou for the plaintiffs because the agent firm on this occasion was one of the bers of the firm.

I do not pursue further the questio was argued at the bar, whether the fr lent misrepresentation of W. Bromley civilly affect the defendant. The onu in the first instance, upon the plaint prove the misrepresentation they alle have been made by the firm. H proved that, in the single case which I mentioned, they have proved enough, the defendant shews that the frau discovered at a time which bars the to relief. The discovery of the fraud shewn to have taken place until wi very short period before filing the Then there is the *suggestio falsi*, wh necessary to constitute the fraud in case, and the loss of the money in quence of that suggestion, unless it coverable against the defendant.

In order that my decision in thi might be placed on as broad a basis a

ble, I have endeavoured to inform myself how the case would stand at law, if the plaintiffs had brought the action at law against the defendant founded only on the receipt of the money. It is admitted that the Statute of Limitations would have been a answer to the demand. I have endeavoured to inform myself whether there was any form of action by which the plaintiffs' proceedings at law might have avoided the statute of Limitations; and I believe I am correct when I say, there are no proceedings at law by which they could have avoided the effect of the statute: no proceedings founded solely on the distinction arising out of the fraud itself. The consequence is, that the plaintiffs have lost their remedy at law by reason of the misrepresentation of W. Bromley, and they are wholly remediless, unless relief is to be had in this court. The misrepresentation which I have mentioned is sufficient to give this Court jurisdiction; and the jurisdiction being assumed on the ground of fraud, time will run from the discovery of the fraud. Feeling that this is a case of great hardship on the part of Mr. J. Bromley, the defendant, I am bound to add, what the counsel for the plaintiffs so frequently said in the course of the argument, that I feel morally certain that there is not the slightest imputation against him. On the ground of civil liability, however, I must decree that he is liable to pay the money with interest and costs.

WIGRAM, V.C. Dec. 5, 7, 17. } WINTER *v.* WINTER.

Legacy — 7 Will. 4. & 1 Vict. c. 26. ss. 33, 34, Construction of.

A legacy to a child of the testator, who was dead at the date of the will, but who left issue surviving the testator, is within the 33rd section of the 7 Will. 4. & 1 Vict. c. 26, so as to prevent a lapse of the legacy.

The testator, John Winter, by his will, dated the 13th of November 1833, after certain specific and pecuniary bequests, gave and devised to John Palmer Winter and J. Cameron, their heirs and assigns, all his freehold and copyhold estates, whatsoever and wheresoever, in trust to sell, and dispose of the same in manner therein mentioned; and he gave and bequeathed all his leasehold estates, and all his personal estate to his said trustees, their executors, &c., upon trusts for sale, and conversion of the same into money; and the testator declared, that his said trustees should stand possessed of the monies to arise from the sale and conversion of his real and personal estate upon trust, in the first place, to pay his debts, legacies, funeral, and testamentary expenses, and subject thereto in trust, as to one sixth part for his son, J. P. Winter, for his own use absolutely; and, as to the remaining five sixths, respectively, for his (the testator's) five children, upon the trusts in his said will mentioned. And the testator appointed the said J. P. Winter and J. Cameron executors. The testator, by a codicil to his said will duly executed and attested, and dated the 16th of February 1839, varied the trusts of the gift in his will to one of his daughters; but in all other respects he ratified and confirmed his will. In 1840, the testator made another codicil to his will, which was duly executed and attested, but did not in any way affect the present question. The testator died shortly after the date of the last codicil. In 1838, J. P. Winter died, leaving issue, who survived the testator, and by his will he appointed his wife executrix. The present bill was filed for the administration of the estate of John Winter the father; and the cause coming on for further directions, the question was argued, whether the executrix of J. P. Winter was by force of the late Wills Act, 7 Will. 4. & 1 Vict. c. 26. ss. 33, 34, entitled to claim the legacy given to J. P. Winter, by the will and codicil of his father, nothwithstanding J. P. Winter was dead at the date of the codicil of 1839.

Mr. Romilly, for the plaintiff, the eldest son of J. P. Winter.

Mr. Willcock, Mr. Walker, Mr. Torriano, Mr. Jones, Mr. Wood, Sir W. Riddell, Mr. K. Parker, and *Mr. Stinton*, for the other parties.

The following cases were cited as bearing upon the question:—

Johnson v. *Johnson*, 3 Hare, 157; s. c. 13 Law J. Rep. (N.S.) Chanc. 79.
Christopherson v. *Naylor*, 1 Mer. 320.

Waugh v. *Waugh*, 2 Myl. & K. 41; s. c. 6 Law J. Rep. (N.S.) Chanc. 176, n.

Tytherleigh v. *Harbin*, 6 Sim. 329; s. c. 5 Law J. Rep. (N.S). Chanc. 15.

Doe d. *Turner* v. *Kett*, 4 Term Rep. 601.

Dec. 17.—WIGRAM, V.C. (after stating the facts of the case).—The question is, whether the legacy to J. P. Winter has altogether lapsed; or whether, by the operation of the act above referred to, the legacy shall take effect as if the death of J. P. Winter had taken place immediately after the death of the testator. And this depends, first, on the effect of the republication of the will; and, secondly, on the construction of the words "shall die" in the 33rd section. With respect to the republication, the case must be considered as if the testator, on the 16th of February 1839, the date of the first codicil, had made a new will in the precise words of the will of 1833; in which case there would have been the bequest of a share of the residue to J. P. Winter, who was dead at that time. With respect to the construction of the 33rd section of the act, the question appears to me to be, whether the words "shall die" in that section mean "shall die after the bequest is made to him by a will made after the 31st of December 1837," or whether the words "shall die" in that section mean "shall die after the act comes into operation." If the former be the right construction, the claim of the executrix of J. P. Winter will fail; if the latter, her claim will be good. On the face of the act itself, I can find nothing to exclude the latter construction in favour of the former; and in the absence of anything on the face of the will to fix the precise meaning of the words "shall die" in the 33rd section of the act, I am bound as well as I can to fix that meaning, by considering the policy of the act, and the objects which it was intended to accomplish. Its policy and objects are manifest, so far as relate to the present question. It was intended to prevent a portion, given by a testator to a child, going from the estate of such child, and leaving his family portionless, by reason of his death under certain circumstances; a consequence of law which the common feeling of mankind declared t appoint the intentions of the testator in instances. The cases of most common o rence where the intention was disappoi were those in which a child died i lifetime of the testator after a bequest to him; and those in which the tes in providing for an absent child, was rant of the fact of his death: in both the family of the child dying, or de the time of the bequest, was left u vided for; and to remedy this the section of the act was passed. The struction of the act which alone will in all the cases which the act must be sumed to have intended to include, i which makes the time of the legatee's unimportant, provided he died after t came into operation, and the will was after that date; and that construction not include any case which is not obvi within the purposes of the act. I ma that, if a testator, by his will dated the act, had made a bequest to an child, who turned out to be dead time, and the will provided that if child should die leaving issue, who survive the testator, that the bequest still take effect in the manner provid the act, I should have no difficul giving effect to the manifest intent the testator. The will in this cas made after the act came into oper and so, in effect, it is the same thi the will must be understood as expr what the act says shall be the conseq That view of the case would not the present question alone, because only declare that which the act em me to declare. If the construction act had been that the words "shal meant "shall die after the bequest is to him," I could not, upon that g have come to my present conclusi think the sound construction of the that the legacy shall not lapse if the b is made after the act comes into oper and that it will apply to a case in the child dies before the bequest is m him, and after the act comes into ope

The Court declared that the execu J. P. Winter was entitled to the lega

V.C. Nov. 6. } GRACE v. WEBB.

Covenant—Marriage, Restriction on.

Where there was a covenant in a deed to pay an unmarried woman an annuity, with a proviso that on her marriage the annuity should be reduced in amount,—It was held that the proviso was void, and that the annuitant, after marriage, was entitled to the annuity without any reduction.

John Webb, by indenture bearing date the 1st of May 1802, after reciting that Elizabeth Elborough, by her then name of Elizabeth Castle, had been delivered of two children, of whom he was the father, and for whom he had made provision, and being desirous of also making some provision and settlement for and upon the said E. Elborough, covenanted with her, that he, his executors and administrators, would pay to the said E. Elborough, for her life, subject to the proviso thereinafter contained, an annuity or clear yearly sum of 40*l.*, payable quarterly; and the proviso was to the effect, that in case the said E. Elborough should at any time thereafter happen to marry with any person or persons whomsoever, then from and immediately after her said marriage, the said annuity or yearly sum of 40*l.* should be and was thereby reduced to the annuity or yearly sum of 20*l.* only. In October 1805, E. Elborough intermarried with Richard Elborough. On the 1st of March 1828, J. Webb died; and by his will, bearing date the 31st of July 1826, ratified and confirmed the said indenture of the 1st of May 1802. After the death of the testator, a suit was instituted for administering his estate. In 1832, the common decree was made for taking the accounts of the testator's estate. Elborough and his wife carried in a state of facts before the Master, and claimed 90*l.* for the arrears of the annuity up to Midsummer 1838, and claimed to have a sufficient sum set apart out of the testator's estate to answer the annuity of 20*l.*

The Master made his report in July 1838, and allowed this charge.

In March 1841, a decree was made on further directions.

In April 1845, Elborough and his wife presented a petition, praying that they might be at liberty to go in before the Master and prove for the annuity of 40*l.* and the arrears: and an order was made in April 1845, in accordance with the prayer of this petition. The Master, by his report, bearing date the 17th of March 1846, found that the testator, J. Webb, paid the annuity of 40*l.* up to the time of the marriage of E. Elborough, and after that time up to his death, the annuity of 20*l.* only; that a certain sum of money was then due and owing to R. Elborough and Elizabeth his wife, on account of arrears of the said annuity of 20*l.*; and that the proviso contained in the indenture of May 1802, for the reduction of the said annuity of 40*l.* to one of 20*l.*, in the event of E. Elborough marrying, was not contrary to public policy, and therefore not void; and he, in consequence, disallowed certain sums of money alleged to be due to the said R. Elborough and Elizabeth his wife, on the ground that they were entitled to them as arrears for the annuity of 40*l.*, instead of that of 20*l.* Objections were taken to this report, and a petition was presented, and now came on for hearing, which prayed that it might be referred back to the Master to review his report, or that exceptions might be filed to the report.

Mr. Bethell and *Mr. Winstanley*, for Mr. and Mrs. Elborough, contended that the proviso in the deed of May 1802 was clearly void, being a general restraint on the liberty of marriage. A gift until marriage, and when the party married then over, would be a valid limitation; but even in a case of that sort it might be a question of intention whether the testator *bonâ fide* intended to benefit the object of the limitation over, or whether his intention was to compel the celibacy of the legatee; in the latter case the limitation would be clearly void. Here there was no gift over, and there could be no other ground assigned for reducing the annuity, except for the purpose of preventing the annuitant from marrying. The cases cited were—

Lowe v. *Peers*, 4 Burr. 2225.
Hartley v. *Rice*, 10 East, 22.
Morley v. *Rennoldson*, 2 Hare, 570; s. c. 12 Law J. Rep. (N.S.) Chanc. 372.

Mr. Stuart and *Mr. G. Lake Russell*, on behalf of the several defendants, urged that it was not the intention of the testator to make

a general restraint on marriage: if so, he would have directed the annuity to cease altogether. A limitation or bequest to an unmarried woman until marriage, and then over, would be good. This must be considered as a gift of 40*l.* per annum until marriage, and of 20*l.* per annum after that. The principle laid down by Lord Thurlow, in *Scott* v. *Tyler* (1) applied here, viz., that "the use of a thing might be given during celibacy for the purpose of intermediate maintenance, and would not be interpreted to a charge of restraining marriage."

Mr. Montagu appeared for other parties.

The Vice Chancellor.—My opinion is, that the case of *Morley* v. *Rennoldson*, before Vice Chancellor Wigram, was rightly decided. It is most beneficial for a state that it should contain a multitude of subjects, and on this ground of public policy the Court has held all limitations in restriction of marriage bad. In the case of widows, however, it is well known the law is relaxed, and limitations in restriction of marriage are allowed. It is supposed that a man has some sort of interest in preserving the viduity of his wife for the benefit of his children, and it is perfectly just that an inducement should be held out to a widow that she should not marry again. But in this case there is no one motive which can be discovered for introducing this clause in restriction of marriage, except that it should operate as an inducement not to marry. It is stated that this gentleman had had children by the lady, and being aware that she might marry again, he offered this sort of pecuniary inducement to her to remain single. My opinion is, that the petitioners are entitled to the larger annuity, and that the clause in the indenture reducing the annuity in case of marriage, is bad.

V.C. Nov. 10. } KIRK *v.* THE BROMLEY UNION.

Contract—Building—Deviations without Written Authority—Acquiescence.

In a building contract, a clause was inserted, that no deviations or additions should be paid for, unless the same should been ordered in writing. Additional was done which had not been order writing, but which had been directed l architects. A bill being filed to obtain ment of the balance,—Held, upon dem that notwithstanding the contract, the d dants, by their conduct, had acquiesce and laid themselves under an obligati pay for the additional work.

The bill stated, that the plaintiff, Cl Kirk, was a builder, and on the 24th of 1844, entered into a contract with the d dants, the guardians of the poor of the E ley Union, in the county of Kent, fo building of a workhouse for the po the Bromley Union, according to c drawings and specifications, and subj certain conditions embodied in the con that the plaintiff made a tender to ex such contract for 5,575*l.*, which tende accepted; that a contract was executed it contained, amongst other provisio clause, that it should be in the power board of guardians, or of the architect the authority of the board of guardian direct such alterations to be made i works during their progress, as they deem expedient, which alterations s not vacate or make void the contrac should be performed by the cont according to the directions he might rec and the value of the same, whether in tion or deduction, was to be ascertaine the said architects, and to be added deducted from the amount of the co accordingly, but no allowance was made to the contractor for extra or tional work, unless the same should have ordered in writing; that in pursuan the said contract, the plaintiff complete building of the workhouse, but that va alterations and additions had been in the original agreement by the ex order and direction of Messrs. Savag Foden, the architects employed b guardians, but no written order was ered to him, authorizing the executi such additional work; that no devi from the plans and designs originally posed, was ever in any case made wi the express sanction of the said M Savage and Foden; that the guardian stantly visited the building, and were

(1) 2 Bro. C.C. 432; s. c. 2 Dick. 722.

aware of and sanctioned all the deviations that were made.

That the plaintiff, on the completion of the building, in February 1845, delivered his bill to the defendants for the sum remaining due to him, under the said contract, and for additional work performed upon the said building, when the architects refused to certify in respect of a sum of 290*l.* 18*s.* 6*d.*, alleging that the additional work, for which this sum was charged, had been done without any written order authorizing the plaintiff to execute the same. The bill contained a charge, that the plaintiff always considered, and was, in fact, induced by the conduct of the defendants, and their acquiescence in the deviations from their original plan of the said building, which were from time to time made by the direction of the said architects, or their clerk of the works, to consider that all such orders were given to him, with the cognizance and by the direction of the defendants; that all the deviations for which the plaintiff had charged as additional work were sanctioned, and approved of, and authorized by the defendants, and minutes of such approval were entered in the minute-book of the proceedings, kept in the board-room of the guardians, and signed by the chairman present at the meetings of the said guardians; that the defendants, during the whole time that the building was in progress, encouraged the plaintiff to believe, and, in fact, gave him to understand that all the additional work, which was performed by the plaintiff, under the direction of Messrs. Savage and Foden, was ordered with the cognizance of the defendants, and by their authority, and would be paid for by them.

The bill contained the charges which are mentioned in the Vice Chancellor's judgment, and then charged that the entries in the minute books of the defendants, relating to the deviations and alterations, formed the necessary written authority for those alterations and deviations.

The bill prayed that it might be declared that the defendants had waived, and were not entitled to insist as against the plaintiff, upon the necessity of any order in writing having been given previous to the execution of the aforesaid works, and that they might be decreed to perform the contract, and pay the balance due to the plaintiff, including the sum charged for additional work.

A demurrer was put in to this bill, by the guardians, for want of equity.

Mr. Stuart and *Mr. Hargrave*, for the demurrer, contended, that as no agreement in writing had been executed, authorizing the deviations from the plaintiff's contract, he could not now be entitled to payment of the sums claimed by him. It was a part of the contract that the plaintiff should not be paid unless there were written directions to execute such alterations.

Mr. Bethell and *Mr. Hetherington*, in support of the bill, urged, that the allegations contained in the bill raised an equity in favour of the plaintiff. The guardians were now in possession of that work which was executed by the plaintiff; the deviations and alterations were performed at the express direction of the architects of the guardians, and the plaintiff was given to understand that such directions were sanctioned by the guardians, who had themselves inspected the works, and had acquiesced in what was done. In other words, they had excited in the plaintiff an impression, that the additions were made with their sanction and approval, and that they would waive the agreement as to such directions being given in writing.

The following cases were cited:—

Carter v. *the Dean and Chapter of Ely*, 7 Sim. 211; s. c. 4 Law J. Rep. (N.S.) Chanc. 132.

Ranger v. *the Great Western Railway Company*, 3 Railway Cases, 298; s. c. 12 Law J. Rep. (N.S.) Chanc. 217.

The Duke of Bedford v. *the Trustees of the British Museum*, 2 Myl. & K. 552; s. c. 2 Law J. Rep. (N.S.) Chanc. 129.

Mitford on Pleading, 118, 119.

Paine v. *the Strand Union*, 15 Law J. Rep. (N.S.) M.C. 89.

Sanders v. *St. Neot's Union*, Ibid. 104.

Williams v. *Earl of Jersey*, Cr. & Ph. 91; s. c. 10 Law J. Rep. (N.S.) Chanc. 149.

The VICE CHANCELLOR.—This case must be decided on general principles; and the general rule certainly in this court is, that the contract which the parties have solemnly

made with each other shall bind both: but it is an acknowledged principle also, that notwithstanding any express contract which the parties may have made with each other, the conduct which one pursues to the other, who acquiesces simultaneously and without objection, may itself amount to a waiver of the contract; and that that is the law is manifest from what took place in the case of *The Duke of Bedford* v. *the Trustees of the British Museum*, where the silence and non-objection to the conduct which had been pursued by one side for a course of a century was thought such as to prevent the party from insisting on the express contract under seal.

Now, then, the meaning of the contract certainly was, that, under the contract, and by force of the contract, the corporation were not to be made liable to any additional expense, in respect to what are called additions or variations, unless the obligation so to pay was manifested by a commencing with a written order. But that stipulation did not prevent the corporation from entering into that sort of obligation which would be thrown upon them by their inducing the party to make the alterations not warranted expressly by the contract, that is, not by a written order. That was holding out an expectation that if he made the alteration the corporation would pay for that alteration. And just see what is stated amongst other things in this bill. It states that the plaintiff "had very seldom any personal communication with the defendants, but all their orders came to the plaintiff through the clerk of the works, who was appointed by them, and acted throughout as their agent, and the plaintiff always considered, and was, in fact, induced by the conduct of the said defendants and their acquiescence in the deviations from the original plans of the said building, which were from time to time made by the directions of the said architects, or their clerk of the works, to consider that all such orders were given to him with the cognizance and by the direction of the said defendants." Then it is also charged "that Savage and Foden, and their clerk of the works, were in the habit of attending the board meetings of the guardians which were held, and of reporting to the board the progress of the building; and on such occasions they laid before the defendants plans of, and acquainted them with any deviations from or additions to the original plan of the building, which the architects found or considered either necessary or expedient, and such deviations and additions were discussed at such times by the said defendants, and the nature and expense of them considered, and the architects were then authorized by the defendants to order such deviations from and additions to the said original plan of the building to be made as the defendants approved of." And it charges "that all the deviations from and additions to the original plan of the building, for which the plaintiff has charged as additional work, were so sanctioned, approved, and authorized by the said defendants, and minutes of such approval were entered in the minute-book of the proceedings kept in the board-room of the said guardians, and signed by the chairman present at the meetings of the several boards of guardians, at which such several matters were discussed."

Now, it appears to me, that that fact being so alleged, and being admitted by the demurrer, there is a clear equity on the part of the plaintiff to enforce for his benefit the right which results from the course of conduct approved of by the defendants, and authorized by them; and it appears to me it is quite consistent with the rules of equity, that, notwithstanding the express contract, the parties have by their own conduct laid themselves under an obligation which this Court would make them fulfil. Therefore, I shall overrule the demurrer.

L.C. July 22; Dec. 5. } KIDD v. NORTH.

Will—Revocation by Incomplete Testamentary Paper—Legacy—Substitution.

J. Kidd, by his will, gave 20l. to his son, and 5l. a piece to such female servants as should be in his service at his decease. By a codicil to his will he gave his servant Biddy 2,000l. He afterwards, by an incomplete testamentary paper, which was admitted to probate, and which was a copy of his will,

with some alterations, gave to his son 19*l.* 19*s.*, *and to his servant Biddy, if she should be in his service at his decease,* 500*l.* *No other servant than Biddy was in his service at his decease :—Held, that, so far as the last testamentary paper extended, it revoked the will and codicils ; and that Biddy took only the* 500*l.* *which was given to her by the last testamentary paper.*

The particulars of this case, and the decision of the Vice Chancellor of England, will be found reported in 14 *Law J. Rep.* (N.S.) Chanc. 349. The legatee of 500*l.* appealed from his Honour's decision.

Mr. James Parker and *Mr. Freeling* appeared for the appellant:

Mr. Bacon and *Mr. Tillotson*, for the respondent ; and

Mr. Koe and *Mr. Hoffman*, for the trustees.

In addition to the cases cited before the Vice Chancellor, the following were mentioned:—

Lyon v. *Colville*, 1 Coll. 449.
Russell v. *Dixon*, 1 Cons. & Law. 294.
Walsh v. *Gladstone*, 13 Sim. 261 ; s. c. 1 Phil. 290 ; 13 Law J. Rep. (N.S.) Chanc. 52.
Hyde v. *Hyde*, 1 Eq. Ca. Abr. 409.

Dec. 5.—The LORD CHANCELLOR said, that where several testamentary papers were admitted to probate, which contained bequests of several legacies to the same person, there was often great difficulty in ascertaining the intention of the testator; that with a view of regulating the decision in such cases, certain rules had been laid down and certain distinctions taken, which, however, would only apply where the papers contained no internal evidence of the testator's intention; but that in the present case he thought there was a manifest intention that the last testamentary paper should be in substitution of all the preceding wills or codicils. The last paper was incomplete; but it had been admitted to probate, and this Court would give effect to it, so far as it appeared to shew the intention of the testator to make a fresh disposition and to revoke his former bequests; and where it did not apply to former dispositions, the prior will or codicil would, of course, retain its validity and effect. With regard to the first question, whether the last testamentary paper shewed with sufficient clearness that the testator intended to make a new and substituted disposition, it was to be observed that by his will, as originally executed, he directed his debts to be paid, gave 20*l.* to his son, and bequeathed nothing to the appellant unless she should be entitled to 5*l.* in consequence of being in his service at his death; and he then disposed of his law books and his watch. By his second codicil he gave to the appellant 2,000*l.* By his last testamentary paper, which was headed "This is my last will," &c. he again directed his debts to be paid, and gave nineteen guineas to his son, and 500*l.* to the appellant. He also gave his law books to a different person, and his watch to —— ——, without inserting any name. As to the provision for payment of his debts and the gift of his law books and his watch, there was clearly a revocation of the former will, and an entirely new disposition; and, under those circumstances, his Lordship thought that it was impossible that the legacy to the appellant could be considered as additional to what he had given her before; but it must be considered as substitutional. *Jackson* v. *Jackson* (1), *The Attorney General* v. *Harley* (2), *Heming* v. *Clutterbuck* (3), and *Fraser* v. *Byng* (4), supported that view of the case. He, therefore, thought that the Vice Chancellor was right in considering that it was the intention of the testator that the appellant should take the last legacy of 500*l.* only, and the appeal must be dismissed, with costs.

M.R. Dec. 17. } REYNELL *v.* SPRYE.

Production of Papers—Privileged Communication—Solicitor and Client.

S, having discovered that R. was entitled to an estate in fee simple, subject to an existing life estate therein, agreed with R. to take proceedings for the recovery of the same on condition of S.'s having

(1) 2 Cox, 35.
(2) 4 Mad. 263.
(3) 1 Bli. N.S. 479.
(4) 1 Russ. & Myl. 90.

one moiety thereof conveyed to him. The conveyance was executed by R. of the moiety, and a suit was instituted by S. in R.'s name, in which Y. was employed as the solicitor. Whilst the suit was in the course of prosecution, R. contracted with S. to sell him the remaining moiety of the estate. The estate shortly afterwards fell into possession, when R, suspecting the conveyance and sale to have been fraudulently contrived between S. and Y, filed his bill to set them aside. S. and Y. having put in their answers, containing schedules of documents, and papers, and correspondence between S. and Y, having relation to the subject-matter of the former suit, it was decided that R. was entitled to require production thereof, and also of the draft of a letter written by Y. to S, relating to the sale of the second moiety, and also of cases prepared and opinions of counsel taken thereon, with reference to the subject-matter of the former suit; the same, though instituted by S, having been instituted for the benefit of both R. and S, and Y. having acted on the behalf and for the benefit of both those parties.

In the year 1843 Sir Thomas Reynell having been discovered by S. to be entitled in fee simple to a real estate of considerable value, as the heir-at-law of Sir R. L. Reynell, who had died intestate, subject to the existing life interest therein of C. H. Reynell, S. caused Y, a solicitor, to write a letter, dated the 12th of May 1843, to Sir T. Reynell, in which was stated Sir T. Reynell's title to the estate, contingent on his surviving the tenant for life. S, in a letter of subsequent date to Sir T. Reynell, stated that he had been advised that the usual course of proceeding in cases where a party took on himself to effectually prosecute the rights of another, was for the parties to divide equally between them the estate recovered, and that he would not disclose the particulars of the plaintiff's right and title, or prosecute the same for him unless a moiety of the estate was secured to him, which was afterwards agreed to by Sir T. Reynell, and in the month of July 1843, a conveyance was accordingly executed by Sir T. Reynell, by which Sir T. Reynell conveyed to S. a moiety of the estate to be recovered, and S. agreed to indemnify Sir T. Reynell against the costs of the suit (*Reynell* v. *Reynell*), which was afterwards instituted by S. in Sir T. Reynell's name against the tenant for life of the estate, and prosecuted, according to the agreement, by Y, a solicitor, at S.'s expense. The tenant for life had executed an appointment purporting to give her husband an interest for his life in the estate in question, which she had no power to do. Whilst the suit of *Reynell* v. *Reynell* was in course of prosecution S. caused his solicitor Y. to write a letter, dated the 17th of April 1844, (the draft of which S. had previously framed and sent to Y,) having for its purpose to induce the plaintiff Sir T. Reynell to sell to S. the remaining moiety of the estate for the sum of 5,000*l.*, and setting forth the difficulties that would be required to be surmounted in order to recover the estate; and in May 1844, the remaining moiety was agreed to be sold to S, by the plaintiff, in consideration of the sum of 5,000*l.*, S. having, in a letter previously written by him to the plaintiff, stated that the value of the plaintiff's interest, according to the estimate of an actuary, was 5,000*l.* only. The object of the present suit, which was instituted by Sir T. Reynell, in the month of January 1846, after the death of the tenant for life, was two-fold, viz. to obtain a discovery of the facts of the case from S. and Y. to enable him to set aside the conveyance of July 1843 already mentioned; and to set aside that conveyance; as well as the contract for the sale to S. of the other moiety of the estate. S, in his answer to the bill, admitted that the estate yielded 1,200*l.* a-year. The real value of the estate was alleged to be upwards of 20,000*l.* Besides the draft letter of the 17th of April 1844, other communications in writing had passed between S. and Y, and were set forth in the schedules to the defendants' answer, together with other documents and papers, and cases submitted to counsel with counsel's opinion thereon, the conveyance to S. by the plaintiff, &c., all of which had reference to the matters, the subject of the suit of *Reynell* v. *Reynell;* and the present motion was for the production of the different documents for the plaintiff's inspection.

Y, in his answer, insisted that the communications with him were confidential an

of a professional character; that he expected remuneration from S. alone, and never received any distinct authority from the plaintiff to act as his solicitor; but he admitted that the plaintiff had no other professional adviser in the suit. The defendant S. also resisted the production of the letters and documents contained in the schedule to his answer.

Mr. Shapter, in support of the motion, contended, that the present was not a case in which the solicitor had been employed, or acted in the ordinary way for his client; Y., as respects the suit of *Reynell* v. *Reynell*, being *particeps criminis* with S, and having acted as the solicitor not exclusively of S, but of the plaintiff as well as of S.

Mr. Kindersley, for the defendant S, contended, that the documents in question ought not to be ordered to be produced; that the plaintiff, having never retained or employed Y. to act for him, could not sue Y. for neglecting to discharge his duties towards the plaintiff; and that neither in the power of attorney, deed of indemnity given to the plaintiff, or the other documents that had been executed by the plaintiff, was there any expression found indicating that Y. was at any time acting as the solicitor for the plaintiff.

Mr. Turner, for the defendant Y, contended, that if the plaintiff had desired, at any time, to take the scheduled papers and documents out of Y.'s custody, he could not have done so; that the cases and opinions of counsel having been respectively prepared and taken before the date of the arrangement entered into between the plaintiff and S, could not be ordered to be produced, and that, at all events, no papers or documents could be directed to be produced that had reference to the present suit.

The cases of—

Herring v. *Clobery*, 1 Phil. 91; s. c. 11 Law J. Rep. (N.S.) Chanc. 149;

Jones v. *Pugh*, 1 Phil. 96; s. c. 11 Law J. Rep. (N.S.) Chanc. 323; and

Holmes v. *Baddeley*, 1 Phil. 476; s. c. 14 Law J. Rep. (N.S.) Chanc. 113;

were cited in opposition to the application.

The MASTER OF THE ROLLS, after observing that the authorities cited had no application to the case before him, stated that the defendant S, on the 29th of April 1843, after the discovery of the plaintiff's rights and interest in an estate, proposed the mode of establishing the same on the principle of "no cure no pay." Y, the solicitor of S, wrote a letter to him for the purpose of its being shewn to the plaintiff, and an offer was made to prosecute the plaintiff's rights, and to obtain the benefit of them, on certain terms, which were consented to by the plaintiff. S. thereupon instituted and prosecuted the suit in the plaintiff's name, for the benefit and interest of S. and the plaintiff, and cases having been prepared, and opinions of counsel thereon taken, for the purposes of the suit, it was contended, that they, and the other documents relating to the suit, were taken for and belonged to S. only; but that was not the case. The opinions taken being important in their nature and favourable to the plaintiff, terms of arrangement were agreed upon between S. and the plaintiff, and a conveyance and power of attorney were executed to carry the same into effect, and an indemnity was given by S. to the plaintiff against any costs to be incurred in the proceedings. The interest of the plaintiff was clearly as much at stake as the interest of S, and Y. acted in the suit as much for the one as the other; and the case was quite different from one in which a party was proceeding on his own sole interest. The letter of the 17th of April 1844 was not a letter written in professional confidence, but written by one party having a particular purpose in view, wherein that party made the solicitor employed a tool for that purpose, and not merely his professional adviser. The documents, papers, and correspondence, having relation to the subject-matter of the suit of *Reynell* v. *Reynell* must, therefore, be produced for the inspection of the plaintiff.

L. C. Nov. 21, 23, 25. { CHRISTIAN *v.* FOSTER. BUNNETT *v.* FOSTER.

Costs—Apportionment—Real and Personal Estate.

Residuary real and personal estate was devised and bequeathed upon trust for the benefit of certain parties for life, during which time the estates were to be kept separate; they were then to be blended together,

and divided among a class. The gift to the class failed, and a suit was then instituted by parties who claimed both estates as personalty. The costs of the suit were directed to be borne proportionally by the real and personal estate; and that, although the title of the heir-at-law to the realty was held by the Court to be free from any doubt.

In this case the testator, who died in 1792, gave and devised real and personal estate to trustees, in trust for the benefit of two persons successively for life; and after the death of both the tenants for life, the real estate was directed to be sold, and the money arising therefrom, and also all the trust funds arising from his personal estate, were to be divided among his brothers' and sisters' children who should be alive at the death of the survivor of the two tenants for life. The last tenant for life died in 1836, and there was not, at that time, any child living of any of the testator's brothers or sisters. The first suit was instituted shortly afterwards.

At the death of the testator his next-of-kin were ten in number, all of whom were now dead, and three only had personal representatives. The first suit was instituted by a party who erroneously supposed himself to be the heir-at-law of the testator; and by other parties who represented themselves as his next-of-kin living at the death of the last tenant for life, against the executors, praying for a division of all the property; or, if there was an intestacy, praying for a division of the personalty, and that the real estate should be conveyed to the heir-at-law. By the inquiries which were directed to the Master, it was ascertained that the representatives of some of the testator's next-of-kin, at his death, and also the representatives of some of the next-of-kin of the children of the testator's brothers and sisters were, and that others of each of those classes were not, parties to the suit; and also that there were two other parties whose claim was preferable to that of the person who was suing as heir-at-law. These two parties agreed to divide the real estate between them.

In 1843 the second suit was instituted by Bunnett, who was one of the next-of-kin of the testator living at his death, by which he sought for the division of the testator's real and personal estate among his next-of-kin living at his death.

One question which was raised was whether the next-of-kin of a child of the testator's brothers or sisters, who died in the lifetime of the tenant for life, could take by substitution. That question was treated by the Master of the Rolls as free from any doubt, and was abandoned at the hearing. The only other question was, whether there was an absolute conversion of the real estate of the testator into personalty. The Master of the Rolls considered there was so little doubt on that point that he decided the question in the absence of the representatives of some of the next-of-kin, who would have been interested in supporting the affirmative of the question; and his Lordship directed the costs of the suits to be paid rateably out of the real and personal estate, according to their respective value (1).

One of the two parties who claimed as heir-at-law, appealed from this decision.

Mr. Rolt and *Mr. Borrett*, appeared for the appellant; and

Mr. J. Parker, *Mr. Elmsley*, and *Mr. Bird*, for different parties in support of the decree.

In support of the appeal, it was stated, that a very large amount of costs had been incurred in making out the pedigrees and tracing the relationship of many persons who were supposed to be some of the next-of-kin; but who were shewn ultimately to have no interest whatever in the property.

Ripley v. *Moysey*, 1 Keen, 578.
Walter v. *Maunde*, 19 Ves. 424.
The Attorney General v. *Southgate*, 12 Sim. 77; s. c. 12 Law J. Rep. (N.S.) Chanc. 147.
Leacroft v. *Maynard*, 1 Ves. jun. 279.
Eyre v. *Marsden*, 4 Myl. & Cr. 231; s. c. 7 Law J. Rep. (N.S.) Chanc. 220,
Jenour v. *Jenour*, 10 Ves. 562.
Cole v. *Wade*, 16 Ves. 27.
West v. *Cole*, 4 You. & Coll. 460; s. c. 10 Law J. Rep. (N.S.) Exch. Eq. 40.
Cholmondeley v. *Clinton*, 4 Bligh, 1.

were cited.

The LORD CHANCELLOR, after mentioning the circumstances of the case, and the de-

(1) Bunnett v. Foster, 7 Beav. 540.

cision of the Master of the Rolls, stated that the petition of appeal did not ask that *all* the costs should be thrown on the personal estate, which would have been a hopeless point to contend for, but only asked that so much of the costs should be paid by each estate, as had been occasioned by the inquiries and other proceedings which related to such estate only. The funds were to be kept separate during the lives of the tenants for life, and were then to be blended together, for the benefit of the parties who were to take ultimately. But in consequence of there being a failure of the parties pointed out by the will, the ultimate disposition of the will had been disappointed; and, therefore, each kind of property retained its original character. These suits were instituted for the proper application of the estate; and the question was, how were the costs to be apportioned.

Where a testator's intention had prevailed as to part of some funds, but had failed as to other part of them, the costs had in many cases been directed to be borne *pro ratâ* by the different funds; and where legacies had partially failed by virtue of the Mortmain Act, the costs had been thrown partly on the property which had been well bequeathed, and partly on the property as to which the legacies failed—*Howse* v. *Chapman* (2), *Ackroyd* v. *Smithson* (3), *The Attorney General* v. *the Earl of Winchelsea* (4), *The Attorney General* v. *Hurst* (5). In *Eyre* v. *Marsden*, the fund was a mixed fund, and expenses had been incurred by inquiries and other proceedings which were necessary to divide the different parts of the fund, one portion of which belonged to the heir-at-law and another portion of which belonged to the next-of-kin. In that case, the costs were directed to be borne *pro ratâ* between those two portions. The case of *Walter* v. *Maunde* approached nearer than any other case to the present one; and there Lord Eldon apportioned the expenses between the real and personal estate. His Lordship was, therefore, of opinion, that the Master of the Rolls's decision was correct. If the question had been doubtful, he should have felt some reluctance in interfering in a question which is so entirely a matter of discretion as a question respecting costs; but here his Lordship thought there was no doubt, and the appeal must be dismissed, with costs.

(2) 4 Ves. 542.
(3) 1 Bro. C.C. 503.
(4) 3 Ibid. 373.
(5) 2 Cox, 364.

L.C. Nov. 10, 14. } MORRIS *v.* HOWES.

Power—Appointment—Feme Covert—Limitation to "Executors and Administrators."

By a marriage settlement, a sum of 1,000*l.* *was charged upon real estates of the husband, for such persons as the wife should, by deed or will, during her coverture, appoint; and, in default of appointment, for the executors, administrators, and assigns of the wife's mother, who was then living:—Held, that the power of appointment could only be exercised during the continuance of the coverture; and, consequently, that an appointment of the* 1,000*l.*, *after the death of the husband, was void; and that the* 1,000*l.* *formed part of the personal estate of the wife's mother, by virtue of the limitation to her executors, administrators, and assigns.*

By a settlement, dated the 12th of June 1776, and made upon the marriage of Henry Ashley and Eliza Hickman, after reciting that the fortune of Eliza Hickman was 900*l.*, to which her mother, Ann Hickman, had agreed to add 100*l.*, H. Ashley conveyed certain hereditaments to the use of himself for life, with remainder to the use of his intended wife for her life, with remainder to trustees for a term of 500 years from the death of the survivor of the husband and wife; and after other remainders therein mentioned, with the ultimate remainder, upon failure of issue of the marriage, to himself in fee. The trusts of the term of 500 years were declared to be, that if the marriage should take effect, and E. Hickman should die, and leave no issue by H. Ashley living at her decease, then that the trustees should, out of the rents, &c. of the hereditaments, or by lease, mortgage, or sale of any part thereof, within six months after the decease of the survivor of E. Hickman and H. Ashley, raise a sum of 1,000*l.*, and pay the same, when raised, to

such person and persons, upon such trust and trusts, and in such manner as E. Hickman, at any times thereafter *during her coverture*, and notwithstanding the same, by any deed or writing, deeds or writings, to be by her duly executed and attested as therein mentioned, should limit, direct, or appoint, give or devise the same; and, for want of and until such limitation, direction, or appointment, gift or devise, to the use and behoof of the said executors, administrators, and assigns of A. Hickman.

H. Ashley died in 1780, without issue; and, in the following year, his widow married Thomas Litchfield. In contemplation of that marriage, a settlement was made in October 1781, by which Mrs. Ashley, in exercise of the powers given to her by the indenture of 1776, appointed the 1,000*l.* to trustees, upon trust for the benefit of the children of her then intended marriage with Mr. Litchfield, and, in default of such issue, for such purposes as she should appoint. There was issue of that marriage, one child only; but prior to the birth of that child, and in 1784, Mrs. Litchfield executed an indenture, dated in January 1784, by which, in exercise of the powers given her by the indenture of 1781, she appointed the 1,000*l.* to her husband, Mr. Litchfield, for his own benefit; and power was reserved to her to revoke that appointment. Mrs. Litchfield died in 1791, leaving her husband, her child, Elizabeth Litchfield, and her mother, Ann Hickman, surviving her. In 1793, A. Hickman had instituted a suit to obtain payment to herself of the 1,000*l.* The cause was heard in 1798, before Lord Loughborough, who dismissed the bill.

A. Hickman died in 1799, and by her will, dated in that year, she gave the residue of her personal estate to her executors, in trust for her children and grandchildren. The estate, subject to the term of 500 years, had become vested in Messrs. Horsman, who were declared bankrupt in 1799. Their assignees having proceeded to sell the estate, it was purchased by Abbey, as agent for T. Litchfield. Litchfield died shortly afterwards, having directed the purchase to be completed, and the estate to be conveyed to his son. A bill was afterwards filed by the vendors, to compel a specific performance of the contract; and in that suit it was decided that the purchasers were entitled to retain 1,000*l.* on account charge created by the settlement of 1 vide *Horsman* v. *Abbey* (1). The 1 was paid into court and invested, an amounted to more than 4,000*l.* In a bill was filed by the personal repre tives of A. Hickman, to administ trust fund. The cause was heard Vice Chancellor Wigram in July when his Honour decided that Eli Hickman's power of appointment only be exercised during the continu her first coverture; and that in the which had happened, the 1,000*l.*, w accumulations, formed part of the p estate of A. Hickman, and passed un bequest of residuary estate contained will. The representatives of the da of Elizabeth and Thomas Litchfiel pealed from that decision.

Mr. Romilly and *Mr. Parker*, f appellants.—The 1,000*l.* was to be ra all events, and it was not to be pai the death of Mr. and Mrs. Ashley. is, therefore, no apparent motive to c the power to the first coverture; b reference to the coverture must be ta point out the form in which the powe be exercised, if it was exercised durin coverture. *Tullett* v. *Armstrong* (2) that a restraint will be revived on a marriage.

Mr. James Parker, *Mr. Elmsley Wood* and *Mr. Sandys* appeared in s of the decree.

On the first point the following rities were cited:—

Beable v. *Dodd*, 1 Term Rep. 19
Horsman v. *Abbey*, 1 Jac. & Walk

As to the effect of the limitation "executors," &c. of A. Hickman, t lowing cases were cited:—

Sclater v. *Travell*, 3 Vin. Abr. 42
Bridge v. *Abbot*, 3 Bro. C.C. 224.
Evans v. *Charles*, 1 Anst. 128.
Long v. *Blackall*, 3 Ves. 486.
Sanders v. *Franks*, 2 Mad. 147.
Vaux v. *Henderson*, 1 Jac. & W. 3
Bland v. *Lamb*, 2 Ibid. 399.
Collier v. *Squire*, 3 Russ. 467; s Law J. Rep. Chanc. 186.

(1) 1 Jac. & Walk. 351.
(2) 4 Myl. & Cr. 377; s. c. 9 Law J. Rep Chanc. 41.

Palin v. *Hills*, 1 Myl. & K. 470; s. c. 2 Law J. Rep. (N.S.) Chanc. 142.
Baines v. *Ottey*, 1 Myl. & K. 465; s. c. 1 Law J. Rep. (N.S.) Chanc. 210.
Bulmer v. *Jay*, 3 Myl. & K. 197.
Stocks v. *Dodsley*, 1 Keen, 325.
Wallis v. *Taylor*, 8 Sim. 241; s. c. 6 Law J. Rep. (N.S.) Chanc. 68.
Holloway v. *Clarkson*, 2 Hare, 521.
Daniel v. *Dudley*, 1 Phil. 1.

Nov. 14.—The LORD CHANCELLOR.—I lately had occasion to consider the effect of a limitation to "executors and administrators," in a case of *The Attorney General* v. *Malkin* (3); and, without adverting any further to that part of the present case, if the power has not been well executed, the fund would form part of the personal estate of A. Hickman. The question is, whether the power given to Elizabeth could be exercised by her at any time, except during her first coverture; whether she was authorized to execute it, when, upon the death of her first husband, she became a widow, and while she was, therefore, a feme sole. The property of the wife, consisting altogether of 1,000*l.*, 900*l.* of which was her own, and 100*l.* contributed by her mother, became the property taken by the husband on the marriage, and the estate was settled so as to give the wife a life estate. Then came this power [his Lordship read it]. Now, she did not execute this power during her coverture, that is to say, during the life of her husband, with whom she was then about to contract marriage. He died; and after his death, and on her second marriage, an instrument was made, purporting to be an execution of this power; and under that instrument, and not under the one which was executed during the second coverture, the claim is now made. Therefore there is no question upon any claim as to the power under the second coverture. Not that this circumstance would make any difference in the view I take of this case, but it seems to have been assumed in the argument, that a question arises whether the power was not renewed upon the second marriage. It turns out, however, that the claim is entirely under the supposed execution of the power, while she was a feme sole; and that question therefore, if it were necessary to consider it, I do not think could make much difference. However, it does not arise. The party claims under a supposed execution of the power in the interval between the two marriages, that is to say, after the coverture of her first husband had determined.

Now, it does seem extremely difficult, without some very positive authority, to suppose that a power to be executed by her "at any time or times during her coverture and notwithstanding the same," (the only coverture referred to in the deed being the marriage then about to be contracted), should be a power which she might execute when she was not covert, but at a period when she was a feme sole, namely, a widow. Not only has no authority been quoted for that view of the case, but a positive decision of Sir Thomas Plumer on this very deed appears to have taken place against it: not between the same parties it is true, and perhaps not in a form which can properly be considered as a decision of a right, being given on a question of title. We know that the parties are not compelled to take a title if there is any reasonable doubt about it: therefore the Court is not so strict in coming to a conclusion upon the actual result, as if the contest were between two parties entitled to the property. But, on a bill for specific performance of a sale of this estate, an objection being made that the estate was subject to this power in the wife to raise the sum of 1,000*l.* out of the estate, Sir Thomas Plumer goes into the subject, discusses the arguments which had been raised before him, and finds that this is a power to be exercised by her during coverture, and not during the period when she was discovert.

Then there was another suit instituted by A. Hickman, to whom the property was ultimately left, that is, who was to have it in the event of there being no power executed, which is in the greatest possible obscurity. It appears to have been a bill filed by A. Hickman, during the continuance of the life estate, and when she, therefore, had no interest in the actual enjoyment. She filed a bill for the purpose of having the money raised, and it appears that Lord Loughborough dismissed that bill. Now the ultimate gift is to her executors and

(3) *Ante*, p. 99.

administrators. A. Hickman filed the bill herself, claiming the property. That decision may have been founded upon a construction of the deed adverse to that which Sir Thomas Plumer had put upon it, and it may have been from various other reasons which do not appear. The only fact that did appear was, that before the title came into possession, the limitation being to her executors or administrators, she herself filed a bill for the purpose of having this money raised, and that bill was dismissed. I have no knowledge whether Lord Loughborough proceeded on the construction of this deed, or whether there were any other infirmities in that suit, which led to its being dismissed; but there is no ambiguity in the ground upon which Sir Thomas Plumer decided, because we have his judgment at length, in 1 *Jac. & Walk.* 385, in which he comments upon the questions raised.

It would require very strong authority to induce any Court to come to the conclusion that a power to be exercised "during her coverture," she being then about to marry, "and notwithstanding the same," was a power which she might execute after the coverture had ceased, and there was no longer any legal disability. I find that that very point was raised on the very same instrument by Sir Thomas Plumer, and decided the other way. In the absence of all authority, in opposition to the decision of Sir Thomas Plumer, added to my own very clear opinion upon the construction of the instrument itself, I cannot have any doubt but that the power executed after the determination of that coverture, was not operative, and, therefore, that the fund went to A. Hickman.

I have already said, upon the authorities to which I have before referred in the other case, that that gift to the "executors" of A. Hickman came to her estate, and became part of her property. I believe that disposes of all the questions.

L.C. Nov. 12. } NEWMAN *v.* RING.

Injunction, Breach of—Costs of Proceedings at Law in Breach of Injunction.

Where a party proceeded in an action at law, notwithstanding an injunction, but under an impression that the injunction no l existed, and it was in fact afterward solved,—this Court refused to interfe deprive him of the costs of the proce so taken.

In this case the plaintiff obtained common injunction to restrain proce in an action at law. After the injun issued, the defendants, under a mist impression that the injunction had dissolved, served the declaration in action. A motion was afterwards ma commit them for the breach of the inj tion, which, however, was refused, paying the costs of the motion. Th junction was afterwards dissolved, a motion by way of appeal for the purpo reviving it was refused by Lord Lyndh (See 15 *Law J. Rep.* (N.S.) Chanc. The plaintiff, thereupon, offered to pa sum for which the action was brought, also the costs of the action up to the when the injunction was granted. Th fendants refused to stay the action, u the subsequent costs were also paid, they proceeded to trial. The pla applied to the Vice Chancellor of Eng to stay the trial, but his Honour refuse motion for the same purpose was now before the Lord Chancellor.

Mr. Cooper and *Mr. Glasse* insisted the defendants were not entitled to as the costs which arose from their doing was a contempt of the Court, namely, ceeding in an action in spite of an inj tion to restrain them from so doing.

Mr. James Parker and *Mr. Perry* not called on.

The LORD CHANCELLOR said that was no authority for such an applicati the present, and he thought the ge principles of the Court were against it. Court had considered that the cont committed by the defendants was not of a nature that they should be committe it; and the Court afterwards held tha injunction was an assistance to which plaintiff was not entitled, and it was solved. The order of the Court for th junction was an improper one; but wh was in force, it certainly ought to have obeyed, and the Court would, if neces find means of supporting its own or

but his Lordship did not consider that this Court would interfere to protect the plaintiff from his liability to pay the costs of the action at law, with which it seemed the Court ought never to have interfered. This motion must be refused with costs.

L. C.
Nov. 19. } PRENDERGAST *v.* LUSHINGTON.

Legacy — Annuity — Appropriation to secure Annuity.

A testator, whose property consisted principally of foreign securities, bequeathed to his trustees so much of his personal estate as would produce 1,500l. a year, which sum was to be appropriated by them at their uncontrouled discretion, and the income was to be paid to his widow for life, with any increase or diminution which might take place in its amount:—Held, that the widow was entitled to have a sufficient sum invested in the 3l. per cents. to secure an annuity of 1,500l. a year.

Guy Lenox Prendergast, by his will, dated the 3rd of April 1839, after making several specific bequests, continued as follows:—"I give and bequeath to my trustees hereinafter named so much of my personal estate and effects as, at the time of my decease, shall produce the clear annual income of 1,500*l.*, and I direct that the same shall be selected and appropriated and set apart so soon as conveniently may be after my decease by my said trustees, or the trustees or trustee for the time being, or the majority of them residing in England in their uncontrouled discretion; and I direct that my said trustees and the trustees or trustee for the time being under this will do and shall stand and be possessed of the personal estate and effects so to be appropriated and set apart, upon trust, to pay the interest, dividends, and annual produce thereof, by equal half-yearly payments unto my dear wife, during her life if she shall so long continue my widow, the first of such half-yearly payments to begin and be made at the end of six calendar months next after my decease. And from and after the decease or second marriage of my said wife I direct that the personal estate and effects which shall be so appropriated and set apart, or the stocks, funds, or securities in or upon which the same shall then be laid out or invested shall sink into and become part of my residuary personal estate. And I direct that in case the yearly interest, dividends, and annual produce of the personal estate and effects so to be appropriated and set apart as aforesaid, or the stocks, funds, or securities in or upon which the same shall or may at any time or times hereafter be laid out or invested, shall from any cause whatever be increased or reduced in amount during the time the same are hereby directed to be paid to my said wife, then and in such case my said wife shall be entitled to have and receive such increased or reduced interest, dividends, and annual produce as the case may be, in lieu and satisfaction of the interest, dividends, and annual produce hereinbefore directed to be paid to her." And the testator empowered his trustees to permit the whole or any part of his personal estate to remain on such securities as it might be invested upon at his decease; or to convert it into money and invest it in the public funds of Great Britain or on real securities.

The testator died in February 1845. His estate consisted principally of foreign securities; and a question was raised, whether the trust for the testator's widow could be satisfied by the appropriation of such an amount of foreign stock as at the time of the testator's death, produced 1,500*l.* per annum: or, whether she was entitled to have an adequate sum invested in the 3*l.* per cents. to secure that annuity. This suit was instituted by the widow of the testator to have the trusts of the will carried into execution.

The cause was heard before Vice Chancellor Wigram in July 1846, and his Honour decided that the plaintiff was entitled to have so much of the personal estate of the testator invested in bank 3*l.* per cent. annuities as would be sufficient to produce a clear annual income of 1,500*l.*

The residuary legatees appealed from this decision.

Mr. Stuart, *Mr. K. Parker* and *Mr. Hetherington*, for the appellants, contended, that the gift to the plaintiff was of a specific character; that it was a gift of the income of a particular fund, and it was expressly

provided that any fluctuations in the stock which might be appropriated for her annuity should affect her alone, and absolute discretion was given to the trustees to select such funds as they thought proper; and that these provisions were inconsistent with an intention to invest a sufficient sum in the 3*l.* per cents., which was the stock selected by the Court as being least liable to fluctuations—*May* v. *Bennett* (1).

Mr. Tinney, Mr. Romilly, Mr. Tennant, Mr. C. Roupell, and *Mr. M'Naghten* appeared for other parties.

The Lord Chancellor.—I never saw a case involved in less doubt than this. The testator gives so much of his personal estate and effects as at the time of his death shall produce the annual income of 1,500*l.*, and directs—[His Lordship here read the part of the will already set forth].—He gives a sufficient sum of his personal estate which shall at the time of his death produce 1,500*l.* to his wife for life, and the trustees are to set apart such portions of the personal estate as will realize the sum of 1,500*l.* a year. But it is well known that difficulties arise in attempts to disentangle an estate from its liability to an annuity. The funds set apart for the purpose of raising the annuity vary by not producing so much at one time as they produced at another time. Then comes the question, how the annuity is to be made up for the annuitant. The testator protects his estate against that contingency by saying, that the fund being appropriated to produce the annuity at the time of his death, if the income varies one way or another, still the widow shall take what the fund produces: if the income increases, she shall have the benefit of it; and if it diminishes, she must take it subject to the diminution. And I am not able to find out what the contest is: there is property vested in foreign funds and producing a large interest, in proportion as the capital is supposed to be in danger; for that depends in all these cases on the value of the principal fund. If it is supposed to be in danger it is compensated for by a large annual payment: if it is supposed to be safe, then the income which it produces is comparatively small.

(1) 1 Russ. 370.

Now, as to how the discretion c trustees was to be exercised in sel these funds, I should say there is an answer to that question. They mu their best to carry into effect the int of the testator; they must select funds which are most likely to produ 1,500*l.* a year, which he clearly int his wife should have, though she w take it for better or for worse, as the an increased or as it diminished. The r the Court is, that if no particular fund the will directed to be appropriated fo purpose, the fund must be invested 3*l.* per cents. And there is nothing i case to restrain the Court from actin cording to its usual practice. The tr are to set apart as they think fit. I had done their duty, they would ha apart a sufficient sum in the 3*l.* per ce produce the 1,500*l.* a year. If that the rule, what is the rule? I asked the rule was. But I am at a loss t out what rule to lay down as to the d tion of the Master. Because it is s ought to send it to the Master. If I that there is any rule which the Master to act upon, and say, that the 3*l.* per is the right fund, there is no questi selection. I think there is no diff about that. It is quite unnecessary t it to the Master, because I have n least doubt, that there being here no a priation out of a particular fund, the a tant is entitled to an investment in t per cent. annuities for the amount c income.

Wigram, V.C.
Nov. 9, 10, 11, 13.
December 16.

DALE *v.* HAM

Frauds, Statute of—Joint Specula buying, improving, and selling Land— nership.

In 1843 *the plaintiff and A. enter a parol contract to become jointly co in a speculation for buying, improvin selling land at B; A. to find the nec capital, and the plaintiff (a land-age select, purchase, lay out, and re-sell th without charge; the advances made with interest, to be the first charge u*

proceeds of the re-sales, and the surplus profits to go, two-thirds to A, and one-third to the plaintiff. Land at B. was selected and purchased by the plaintiff accordingly, and A. afterwards made over a moiety of his interest in the speculation to C. The purchase-money was provided by A. and C., and the conveyance taken in their joint names. On the plaintiff repeatedly pressing, by letters to A, for some acknowledgment in writing of his interest, A. handed over to him a copy of an agreement, dated the 27th of October 1843, *and made between A. and C, to the effect that A. and C. were interested in two-thirds of the surplus profits, and that the remaining one-third was to be reserved for the plaintiff; but that the plaintiff should have no power to determine when any re-sale should take place. In* 1844 *A. died, having devised the property by his will. To a bill by the plaintiff against C. and the devisees of A. for an account, a sale of the land, and application of the proceeds, according to the agreement, all the defendants, by their answer, insisted on the Statute of Frauds, C. by his answer, admitting that, previously to his joining in the speculation, A. had informed him that the plaintiff was to have one-third of the surplus profits:— Held, that this was a partnership; and that, the fact of the partnership being established by general evidence, the land would be dealt with in equity as the stock of the partnership, and that the statute was no bar to the plaintiff's claim. Secondly, that the memorandum of October* 1843, *coupled with the previous assertions in writing of the plaintiff's right, which was never denied by A, was a sufficient manifestation in writing, within the statute, of the pre-existing interest of the plaintiff in the lands. The Court directed two issues: first, whether it was agreed between the plaintiff and A. that they should be jointly interested in purchasing, &c. land at B; and, secondly, (if the verdict on the first issue should be in the plaintiff's favour) whether it was a term in such agreement that the plaintiff should have no power of determining the period of the re-sales of the land.*

The bill stated, that, previously to the year 1843, the plaintiff carried on business as a surveyor and land-agent at Birkenhead, in the county of Chester, and had acquired an accurate knowledge of the value of land there situate, and of the best means of laying out such land for building purposes; that, in the year 1843, Robert M'Adam, deceased, a merchant at Liverpool, proposed to the plaintiff that he should select and purchase a suitable quantity of land for the purpose of a joint speculation, and that the plaintiff and R. M'Adam should be mutually interested in such purchases upon the terms following: namely, that the purchase-money should be advanced by R. M'Adam, and should be repaid to him, with interest, out of the proceeds when re-sold, antecedently to any division of profits, and that the plaintiff should contribute his best skill and judgment, and professional services as such land-agent and surveyor, in laying out and preparing for sale such land, when purchased, and in superintending and negotiating such re-sale, &c.; and that all the profit or loss of such speculation should be shared and made good by and between the plaintiff and R. M'Adam, in the proportions following: namely, one-third thereof by the plaintiff, and the other two-thirds thereof by R. M'Adam. The plaintiff agreed to the proposal; and it was then arranged that the conveyance of the lands to be purchased should be taken in the name of R. M'Adam, but for the benefit of the plaintiff and R. M'Adam, according to the terms aforesaid. In pursuance of such agreement the plaintiff selected 26,000 square yards of land, or thereabouts, situate in Prices Street, Camden Street, and Lord Street, at Birkenhead; and, in June 1843, the plaintiff, in the name of R. M'Adam, duly contracted for the purchase of the same, and, on the 24th of June 1843, wrote R. M'Adam the following letter: "I am happy to inform you that I have made a most excellent arrangement for the 26,000 yards of land, Prices Street, &c., being at 4*s.* 9*d.* per square yard. I consider this as one of the best purchases that has been made for some time, as I can clearly see a profit in it of at least 100 per cent. It must be understood that I am to be interested in the purchase, taking profit and loss of one-third; I taking all the trouble of laying out the lots and selling, and you finding the capital; and before any division of profits are made you to receive interest at 4*l.* per cent. per annum on all

monies employed in such speculation. (Signed) Thomas Dale."

In reply, R. M'Adam wrote as follows:

"June 28, 1843.

"I received your letter of the 24th inst., and shall be in Liverpool on Saturday, when I shall have the pleasure of seeing you. Signed, R. M'Adam."

Shortly after the date of the last letter, R. M'Adam called upon the plaintiff and proposed to the plaintiff that he, M'Adam, should be allowed interest at 5*l.* per cent. upon the capital expended; to which proposal the plaintiff agreed, and R. M'Adam in all other respects ratified the terms of agreement as set out in the plaintiff's letter, and promised that upon the completion of the said purchase, a memorandum in writing, embodying such terms, should be formally drawn out and signed by the parties respectively. Shortly after the said interview, the plaintiff selected and purchased of Mr. Hilliar, for the purposes of the said speculation, 480 square yards of land, adjoining the last-mentioned purchase. In September 1843, the plaintiff prepared and sent to R. M'Adam a memorandum, in writing, of the terms of the joint speculation as follows:—"Memorandum of agreement as to the terms on which R. M'Adam and T. A. Dale are jointly interested in speculation of land, situate at Prices Street, &c., as purchased from T. Forsyth and his trustees, and also from Hilliar by the said R. M'Adam, that purchased from T. Forsyth containing 25,400 square yards at 4*s.* 9*d.* per square yard; that from Hilliar containing 480, at 8*s.* 6*d.* per square yard. General terms affecting such speculation: All accounts to be made up annually upon the principle of bankers' accounts; interest at 5*l.* per cent. to be credited to R. M'Adam, who engaged to advance the whole of the capital for working the said speculation to advantage; and all monies advanced to bear interest from the time of payment; and all monies received to go to the credit of the said account, the interest on such portions ceasing. This speculation is to be as follows: viz., that R. M'Adam takes two thirds of profit and loss, and T. A. Dale takes one third of profit and loss; T. A. Dale to make all measurements and surveys of land, supply all plans, survey all buildings at any time in progres do any business within his departm power, and effect all sales withou charge." The said memorandum w proved of by R. M'Adam in Sept 1843, but he declined signing it unt purchases should be completed, an plaintiff then left the same in his cu Shortly afterwards, the defendant H ton, a surgeon at Liverpool, agreed R. M'Adam (the plaintiff consenting the sum required for completing th purchases should be advanced b M'Adam and Hamilton in equal moi and that R. M'Adam and Hamilton s as between themselves, be interested moiety each of the two-thirds of th speculation which belonged to R. M' The purchase-money for the land, am ing in the whole to 6,248*l.* 7*s.* 6*d.* advanced in equal moieties by R. M'. and Hamilton, and by a deed, date 16th of September 1843, the parc land were conveyed to the use c M'Adam and Hamilton in undivided ties. The said deed was prepared b executed under the superintendence solicitor of M'Adam and Hamilton the plaintiff was no party thereto, no his interest in the land noticed th After the execution of the said dee M'Adam and Hamilton, without the p of the plaintiff, respectively signe memorandum following:—

"October 27th, 1

"Memorandum of agreement be R. M'Adam and R. Hamilton relativ lot of land in Prices Street, &c. Th said R. M'Adam and R. Hamilton sh vance each one-half of the purchase-m and that they shall receive interest same at the rate of 5*l.* per cent. per an that the said R. M'Adam and R. Ha are to have each one third interest said purchase; and that they are to r one-third of the profits arising the for T. A. Dale in lieu of his comm for purchasing, selling, surveying, va laying out in lots, or any other se that may be required of him; but clearly and distinctly understood th said T. A. Dale shall have no pow authority whatsoever over the said and that he shall not be entitled to r any compensation whatsoever the

until the whole is sold and paid for, and all outlay and expenses incurred thereon are deducted therefrom. Signed,

"R. M'Adam.
"R. Hamilton."

On the plaintiff pressing R. M'Adam to sign the memorandum prepared by the plaintiff, R. M'Adam handed to the plaintiff a copy of the memorandum signed by himself and Hamilton, saying that that was sufficient, and refused to sign any other.

On the 14th of November 1843, the plaintiff wrote to R. M'Adam as follows:—"Having been the means of calling your attention to this good purchase, and you and I agreeing that I was to have one-third of the profits arising therefrom, I feel assured that you will allow me to request you will give me a note in addition to the agreement you handed to me: first, that no sale shall be effected without my being consulted, and, secondly, that as soon as you are reimbursed the whole of your outlay, with interest, that I shall then, from time to time, receive one-third of all such subsequent sales." In December 1844, R. M'Adam died, having, by his will, given all his real and personal property to seven persons therein described, in equal shares; and having appointed A. Stephenson and D. M'Nichol his executors, who duly proved his will. The bill then charged that the defendants, Hamilton and the devisees of R. M'Adam, threatened to make a partition of the said lands among themselves, in total disregard of the plaintiff's rights, and had prepared deeds and plans to carry their purpose into effect; and it prayed that the premises comprised in the deed of September 1843 might be sold, and the accounts of the said joint speculation wound up and adjusted, and the proceeds of such sale applied in conformity with the terms of the agreement, the plaintiff offering to perform all such services as ought to be performed by him, pursuant to the said agreement; and that the defendants might be restrained from proceeding to make a partition of the lands in question.

The defendant Hamilton, by his answer, admitted, that in the latter end of June 1843, R. M'Adam informed him that he had contracted for the land in question, upon the speculation of selling it in lots, for building purposes; and represented to the defendant that he expected considerable profit therefrom, but he was desirous of embarking to the extent only of one-half of the purchase-money; and proposed that the defendant should join him in such speculation: and, in the course of conversation, R. M'Adam informed the defendant that he had employed the plaintiff to aid him in making such purchase, and in laying out and disposing of such land, and that he, M'Adam, had agreed to give the plaintiff, by way of remuneration, and in lieu of all commission, one clear third part of the profits, which should be ultimately realized from such purchase and sale; such remuneration to depend entirely upon, and be only payable out of the said ultimate profit; such arrangement being made with the view, as R. M'Adam represented, of commanding the best energies and services of the plaintiff throughout the said speculation. The answer then stated, that the plaintiff had given up his business at Liverpool, and had retired to Cheltenham, and had withdrawn himself from the management of the lands in question, and had thereby disentitled himself to any remuneration under the alleged agreement (if any); and the defendant admitted that on the 18th of May 1845, the plaintiff had an interview with him, when he, under the impression that the agreement of the 27th of October 1843, was binding upon him, admitted, that upon the sale of the lands the plaintiff would be entitled to one-third of the profits. The defendant then insisted that the plaintiff had no right, either at law or in equity, to the lands in question, and pleaded the Statute of Frauds in bar of the plaintiff's claim.

It appeared in evidence that the present value of the lands in question was upwards of 25,000*l.* The before-mentioned agreement, prepared by the plaintiff, and the letters from the plaintiff to the testator, were produced by the executors of the testator. The defendants, the executors and devisees, by their answer, disclaimed all knowledge of the alleged agreement, and set up the Statute of Frauds as a bar.

Mr. Romilly and *Mr. R. Palmer*, for the plaintiff.—First, the Statute of Frauds does not apply in this case, because the testator and the plaintiff, as partners, were engaged in a joint speculation in land. It

is then only necessary to prove the fact of partnership, and the land is then considered only as an adjunct to the partnership business—*Forster* v. *Hale* (1), *Morton* v. *Tewart* (2), and *Peck* v. *Cardwell* (3). It makes no difference that the whole money consideration flowed from one partner—*Reid* v. *Hollinshead* (4). The partners in whose name the conveyance is taken are trustees for the others—*Tawney* v. *Crowther* (5), and *Gregory* v. *Williams* (6). Secondly, the agreement of the 27th of October 1843, sufficiently manifests the trusts, in the plaintiff's favour, upon which the testator and Hamilton held the lands. Thirdly, the part performance of the agreement will take the case out of the statute—*Kine* v. *Balfe* (7). The partnership being dissolved by the death of R. M'Adam, the plaintiff is entitled to have the partnership affairs wound up, and his proportion ascertained; otherwise the defendants may keep the property unsold for any length of time, to the injury of the plaintiff.

Mr. Rolt and *Mr. Willcock*, for the defendant Hamilton.—This case is within the statute; for the plaintiff claims, by his bill, a direct interest in the land. The cases relied on by the plaintiff are cases where the estate purchased was subservient to the partnership, and necessary for the carrying on of a trade—*Nerot* v. *Burnand* (8); but here two persons agree to purchase land jointly, for the purpose of selling it again; that does not constitute them partners, but joint owners of the land. Mining concerns are a clear exception to the general rule—*Crawshay* v. *Maule* (9), and *Fereday* v. *Wightwick* (10); but the sale of shares in a mining company has been held to be within the statute—*Boyce* v. *Green* (11). The memorandum of the 27th of October 1843 gave the plaintiff no interest, being *res inter alios acta;* but was merely an arrangement between the testator and Hamilton as method of paying the plaintiff for hi vices—*Colyear* v. *Mulgrave* (12); bu was more, the plaintiff has repudiated it claims something else; but that mem dum expressly shuts out the plaintiff having any controul over the land; t fore, the present suit is premature— v. *Cardwell:* and the plaintiff havin himself into that situation, that he is u to render the services stipulated for, c now ask for the price of those service

The following authorities were al ferred to:—

Lees v. *Nuttall*, 1 Russ. & Myl. 5
Austin v. *Chambers*, 6 Cl. & Fin.
Jackson v. *Jackson*, 9 Ves. 597.
Collyer on Partnership, 110.

Mr. Wood and *Mr. Fleming*, for t visees of R. M'Adam.

Mr. Romilly, in reply.—The doc of the 27th of October 1843 is a d declaration, within the statute, by bo holders of the land, that it was held f benefit of the plaintiff. The trust m pre-existing or contemporaneous wi declaration. This document is at lea dence of a pre-existing trust; and Ha admits, by his answer, that the testat previously informed him that he had the plaintiff one-third of the profits. unauthorized terms introduced int document will not affect the pla rights. The suit was not premature, defendants had threatened and taken to effect a partition of the property themselves, and had altogether deni plaintiff's right.

Dec. 16, 1846.—WIGRAM, V.C.— stating the effect of the bill and answe Now if I may assume that a contract as the plaintiff alleges, really was and, if I had only to consider wh morality and justice of the case requ cannot understand that any one wh the admission in Hamilton's answe reads also the memorandum signed b milton and M'Adam, can have any whatever as to what the justice of th

(1) 3 Ves. 696; s. c. on appeal, 5 Ibid. 308.
(2) 2 You. & Coll. C.C. 67.
(3) 2 Beav. 137.
(4) 4 B. & C. 867.
(5) 3 Bro. C.C. 161, 318.
(6) 3 Mer. 582.
(7) 2 Ball & B. 343.
(8) 4 Russ. 247; s. c. 6 Law J. Rep. Chanc. 81.
(9) 1 Swanst. 518.
(10) 1 Russ. & Myl. 45.
(11) 1 Sugd. Vend. & Pur. 158. ed. 10.
(12) 2 Keen, 81; s c. 5 Law J. Rep. Chanc. 335.

is. The land has risen from 6,000*l.* to near 30,000*l.* in value, and yet the plaintiff's right to participate in any part of that profit is altogether denied. It is said, however, that the defendants are right in point of law; and, if they are so, I shall certainly not, merely on moral grounds, take upon myself to alter what the law of the case may appear to be. The principal ground of defence was founded on the Statute of Frauds; and to that question I shall first address myself. The plaintiff, claiming an interest in land which is vested in the defendants, has not produced, and he admits there was not, any agreement in writing, signed by M'Adam, such as he alleges to have been made between himself and M'Adam: nor has he relied upon any act of part-performance in that sense of the term, which, according to the doctrines of this Court, would take the case out of the Statute of Frauds. It is in general of the essence of such an act that the Court shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract (delivery of possession is the common example of this). One man, without being amenable to the charge of trespass, is found in the possession of another man's land: such a state of things is considered as shewing, unequivocally, that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance — *Morphett* v. *Jones* (13). But where an act, though in truth done in pursuance of a contract, admits of explanation, without supposing a contract, such act is not, in general, admitted as an act of part-performance to take the case out of the Statute of Frauds,—as, for example, the payment of purchase-money. The cases on this subject are collected in *Sugden's Vendor and Purchaser*, pp. 140, 141, 142. ed. 11. The fraud, in a moral point of view, may be as great in the one case as in the other; but in these latter cases the Court does not give relief on the ground of the Statute of Frauds. In this case the only acts done have been the conveyance, which apparently negatives the contract which the plaintiff relies on, and the acts of the plaintiff, which may as naturally be referred to his character of hired surveyor and agent, as to a contract giving him an interest in lands. The plaintiff has, however, relied upon another ground for taking the case out of the statute. He says, that where a partnership or an agreement in the nature of a partnership exists between two persons, and land is acquired by the partnership as a substratum for such partnership, the land is in the nature of the stock in trade of the partnership; and that, the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether that stock be land or of any other nature.

That land acquired as the substratum of a partnership is in this court considered in the light which the plaintiff contends for may be admitted upon very high authority —*Crawshay* v. *Maule*, *Fereday* v. *Wightwick*; and that where a partnership exists, and land is brought into, and actually used and enjoyed by, the partnership for partnership purposes, the Court has dealt with it as partnership property, although the ownership has apparently been not in all the members of the firm, or if in all, not apparently as partners, but under another title; and that the Court has so done, without calling in the doctrine of part-performance, must I think be also admitted. But whether a simple case like that before me, divested of everything but an agreement for a partnership, can be brought within the scope of the cases relied upon, is a question of no inconsiderable difficulty. When the proposition was first advanced by the plaintiff, I confess, it appeared to me, that the Statute of Frauds was virtually repealed, or nearly so, if the argument were admitted to the extent contended for; for if a party, by holding an interest in land of any specific kind, can escape from that safeguard against fraud and perjury which the statute has provided, it remains only that those who are prepared by fraud and perjury to invade the rights of another, shall make that specific interest (to which it is said the act does not extend) the ground of their claim, and the statute is at once evaded. Thus, if A. alleges that B. agreed to give him an

(13) 1 Swanst. 172.

interest in land, the statute applies; but, if he adds, that the land was to be improved and re-sold at their joint risk of profit and loss, then, according to the argument, the statute does not apply. At the same time, if decisions have established the general proposition for which the plaintiff contends, it is not because his case (provided it be within the authorities) is an extreme case, that I am at liberty to refuse him the benefit of the decisions he relies on. The case may exemplify the inconvenience of the alleged exception to the Statute of Frauds; but if decisions have established that for which the plaintiff contends, and the case is within them, he will be entitled to the relief he asks.

Now, in order to try this question in the most simple manner, I will suppose the case to be the converse of what it is; namely, that the land purchased instead of rising from 6,000*l.* to 30,000*l.* had fallen in value, that a loss had been sustained, and that Hamilton and M'Adam were the plaintiffs seeking to compel Dale to contribute his proportion of the loss; if, in that case, the authorities would have enabled Hamilton and M'Adam, by proving the partnership with Dale, and that the land was part of the partnership stock and effects,—if the case would have entitled them to have compelled contribution from Dale, the same authorities will, upon like proof, support the present suit upon the principle (that of mutuality in remedies) which enables a vendor to recover the purchase-money in this court, though the remedy at law may be equally adequate and more appropriate; not, however, that the remedy at law would be equally adequate in this case, if the plaintiff is right in that which he contends for. In *Jeffereys* v. *Small* (14), decided in 1683, two persons jointly stocked a farm, and occupied it as joint tenants. One died, and the bill was to be relieved against survivorship. The Lord Keeper said, that if the farm had been taken jointly by them, and had proved a good bargain, survivorship would take place; but as to a joint undertaking in the way of trade or the like, it was otherwise. In the case of *Jackson* v. *Jackson*, Lord Eldon, referring to this case, says, "This general law of merchants, originally applicable to trade only, has extended a good deal: *Jeffereys* v. *S* approved, with some distinctions, in s quent cases." The bearing of that case the principal case is closer than at sight appears. The two parties were tenants by the original title. Their exp ture was equal, the perception of p was equal, their acts and dealings simply consistent with their rights as tenants, and therefore there certainl no unequivocal act, shewing an intent alter their relative position as joint ten yet the Court appears to have adn evidence of a contract to deal with it trade, following up the decision wit consequences of the contract. *La Craddock* (15), decided in 1729, is the case, and is in some respects analogous last; but that case may not perhaps b sidered a strong authority for the plai proposition, except so far as it shews joint speculation in improving land hazard of profit and loss is treated i Court as in the nature of merchandizin the *jus accrescendi* not allowed; for, as can be collected from the repor partnership contracts between the li parties were admitted, and the only tion was upon the consequences of tha tract; and the consequences certainly carried a great length, for one of th original contractors, who had retire nearly thirty years, was held bound subsequent contract made by the four for the purchase of other lands of the original design.

In that case of *Lake* v. *Craddock* Master of the Rolls said, "Supposin of the partners had laid out the money and had happened to die according to the contrary constructic must have lost all, which would have most unjust." Lord Eldon comm on this case, in 9 *Ves.* p. 597, said purchase of the land was made t intent that they might become partn the improvement; that it was only th stratum for an adventure, in the pro which it was previously intended they s be concerned."

The next case is *Elliot* v. *Brown*, from Lord Colchester's Notes, in 3 *S*

(14) 1 Vern. 217.

(15) 3 P. Wms. 158.

489, n.; and that case appears to me to have a close bearing on the present. Two persons took a joint lease of a farm, and farmed it on their joint account. One died before the expiration of the lease. The title of the executors to a moiety of the stock was admitted by the survivor, but the survivor claimed the remainder of the lease by survivorship. The Lord Chancellor said, "By the joint tenancy, the lease would survive; yet, if turned by agreement into a partnership, it would not survive. The law is clear. The only question is of fact, whether there be such an agreement." He thought the lease accessory to the trade in which the parties were embarked. Of this case Lord Eldon, in 9 *Ves.* 596, says, "I have a note of my own of a case of *Elliot* v. *Brown*, in which another distinction was taken by Lord Thurlow, that the law with reference to the stock would be the same as to the lease, provided the lease was taken only for the same purpose as the stock, and the lease was only the substratum." The observation I made on the case of *Jeffereys* v. *Small* applies to this case. A joint tenancy by two, occupancy by the two joint tenants, equal expenditure by the two, and equal profits to the two. In the absence of contract, survivorship would be the legal consequence. But the Lord Chancellor says, "If there were a contract for partnership, it must prevail; and the right of survivorship will not attach." In both these cases, without any contract in writing, or any dealing with the property by the joint tenants which was not properly consistent with the title of joint tenancy, the Court admitted evidence of a partnership contract, whereby the rights of the joint tenants, *inter se*, were varied. The next case I shall refer to may, perhaps, be considered as going much further—*Forster* v. *Hale*, which cause came before the Court in 1798. Four persons, of whom Burdon was one, were bankers in partnership. In June 1791, Burdon, Peareth, and two other persons took a lease of the Hebburn Colliery for thirty-one years, as tenants in common, in equal fourth parts. The colliery was carried on under the firm of Burdon, Peareth, & Co. Burdon died in December 1792, and the bill was filed by two of the surviving partners in the bank, against the executors of Burdon; and the bank claimed an interest with Burdon in the fourth share of the colliery to which he was entitled under the lease. It is material, in this case, to observe that the partners in the bank, other than Burdon, never intermeddled with, nor had any visible possession of the colliery. The colliery banked with the plaintiffs' firm, and the private books of the bank shewed that the bankers, besides Burdon, were treated as jointly interested with him. Burdon lived a long way off, and was not present at the bank, but he was a partner of the firm. On the argument of the case at the Rolls, three points were made:—first, that by Burdon's letters, produced in the cause, a trust for his co-partners in the bank was manifested and proved within the Statute of Frauds; secondly, that a trust by implication arose upon the entries in the bankers' books; and, thirdly, as appears by the arguments of counsel, and not by the statement of the case, that a colliery was an article of trade, and therefore that the agreement was not to be considered as an agreement concerning lands. The Master of the Rolls held, that by the letters of Burdon, sent by him, a trust for his partners in the bank was manifested and proved; and he says, "I should have decided upon this evidence alone, provided there was no other evidence to rebut it in the other parts of the case." He does, however, examine the other parts of the case, not for the purpose of seeing whether he could found a decree in the plaintiffs' favour upon those other parts of the case, but for the purpose only of seeing whether the acts of the parties shewed that his inference from Burdon's letters was an erroneous inference; and among other facts, he shews, as did the Lord Chancellor afterwards on appeal, that the banking firm contributed to the expense of working the colliery. But in neither branch of the Court was it intimated that this would create a resulting trust to take the case out of the Statute of Frauds. Burdon, in fact, never saw the books. The case was carried by appeal to the Lord Chancellor, and Lord Rosslyn expressed his entire concurrence in the conclusion to which the Master of the Rolls had come upon the grounds on which he had founded his judgment; but he considered the case as wholly out of the Statute of Frauds. The Lord Chancellor, at the

opening of the case, observed, that the question was not, whether there was a declaration of trust within the statute, but whether there was a partnership: "The subject being an agreement for land, the question then is, whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact, that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of that partnership are, by operation of law, held for the purposes of that partnership." It is right, however, that I should notice another passage in the judgment of the Lord Chancellor, from which it may probably be thought that the force of the preceding language is in some degree weakened. He observes, that in the first view he thought it was a case independent of the statute; and then he says, "The case appeared to me in rather a different point of view. From the nature of it, it seems to me, there was no occasion to affect the estate in the land; nor has the decree done so. It has not transferred the legal interest in the share of the colliery to the plaintiffs. The case is merely a case of agreement to share profit and loss in the trade of a colliery; which does not at all affect the ownership of the land, which is often carried on for a great number of years without any estate in the land given to those who are to share the profits. Nothing is more common than where a man is tenant in fee of land, where there is a coal work, he, partly sharing the rent and the profit, carries it on by mere licence, with other persons concerned in the business of the colliery. It is, therefore, merely the case of an agreement which may or may not be within the 4th section of the statute. But this particular case is not even within the 4th section, because it was to be executed immediately," &c. The Lord Chancellor then proceeds to shew that the evidence proves the partnership, and concludes:—"Therefore, though an issue might have been had perhaps before the cause was canvassed, I cannot direct an issue; for if the verdict found that these plaintiffs not engaged in partnership with Burd this colliery, I should not let that v stand."

The case of *Peck* v. *Cardwell* bea the principal case in one of its aspects not, I think, in that which I am now sidering. The principle upon which, I sume, the above cases have proceede been partly the jurisdiction of the Co cases between partners touching the nership property, and partly its jurisdi to relieve against the fraud of a pa who should avail himself of his legal r in violation of his partnership cont fraud, as against which no remedy, adequate remedy, could be had at law. then, the hypothetical case I am consid within the scope of the cases above re to, as a case in which I am bound to re general evidence of the partnership tract, which the plaintiff suggests, a follow it up, if proved, with the conseq contended for? In order to try this, be assumed that, by parol evidence of u ceptionable credit, the alleged contrac be proved, and that the plaintiff, in purs of it, selected the land for purchase, the contract for it, and laid it out, an every act which the contract required to do—Hamilton and M'Adam payin purchase money—and, a loss having sustained, he refused to contribute t loss. I confess I do not see what in ciple there would be in that hypoth case to distinguish it from the cases re to.

If, in *Jeffereys* v. *Small* and *Ell Brown* (I omit for the present *Fors Hale*,) general evidence was admissi alter this contract (the apparent rig the parties as joint tenants), though was no agreement in writing, and the were altogether and simply consistent a joint tenancy, why should it be exc in the case supposed? The circums that each joint tenant had an interest i land, cannot affect the question as be themselves; and the circumstance that was in possession could make no diffe because their interest in joint tenan the common principle would explain condition; yet the Court, without writing, and without once referring t doctrine of that part-performance, hel

the rights of the partners, *inter se*, were altered by force of the partnership contract, and that alone. If the existence of a partnership contract were a sufficient reason to give new and altered interests in land in those cases, what, but a merely arbitrary decision, could exclude it here, the existence of the partnership contract, and the acting under it in the way supposed, being assumed? Nor do I see, on the same hypothesis, how, in principle, I can refuse to apply to this case the reasoning in *Forster* v. *Hale*. It is, without doubt, a gross moral fraud for a vendor who has got his purchase-money to withhold the conveyance; but payment of purchase-money will not take a case out of the Statute of Frauds: so the advances made by the bankers in *Forster* v. *Hale*, and accepted by Burdon, together with other persons in the colliery, would have made it a gross moral fraud in him to deny the interest of his partners in the bank in the lease; still it was clearly an advance of money, and though the bankers' books, in that case, made the case plain, that consideration affects only the weight of the evidence, and not the question of its admissibility. It is clear, moreover, that Lord Rosslyn founded himself entirely upon the proposition, that the existence of the partnership drew with it the right to have the stock of the partnership, whether land or other stock, ascertained; and though, in one part of his judgment, he observes, that an estate in the land is not necessary to, and often does not accompany the interest of partners in a mine, his argument throughout is founded on the partnership contract, and the consequences incident to it. A contract between Burdon and a single individual that that individual should have all Burdon's interest in the colliery, could not have been enforced in that case. It was the partnership, and nothing else, which was the foundation of Lord Rosslyn's judgment. Difficult, however, as the proposition is, it derives some support by way of analogy (though I admit a distinction may be taken between them) from the cases which were referred to and acted upon, by Lord Cottenham in *Taylor* v. *Salmon*(16), in which case, upon proof of agency, it was held, that a trust attached in land purchased by the agent, though he denied the agency. Here, in principle, the partner purchasing land for the use of his firm, may be considered as the agent of his firm, in order to bring the case within the principle of the cases I have referred to. Those cases are cited by Sir E. Sugden, *Vend. and Pur.* p. 46. pl. 8. ed. 11. But it is said that no such partnership as the bill alleges is proved in the case, and the existence of the partnership, up to this time, I have assumed; and this I must admit, at least as against the devisees of R. M'Adam. But the question before me is not confined to it. The question is, whether there is not enough proved to entitle the plaintiff to an inquiry upon that point.

Now, first, observe the memorandum of the 27th of October 1843. Two objections were taken by the defendants to the effect of that document: one, that it was *res inter alios acta;* and the other, that the plaintiff, upon the document being tendered to him, had rejected its terms, and, therefore, could not again insist upon it. One observation appears to me to answer both these objections. If the document were in the nature of a voluntary instrument, containing an offer to a person having and claiming no precedent interest, the objection might, perhaps, prevail; but that is not the case here. In order rightly to understand the effect of the document, I am bound to place myself, by evidence, in the position of the parties making, delivering, and receiving it. Now, from the beginning, the plaintiff had been insisting in writing upon the rights which he now claims, and pressing M'Adam to furnish him with written evidence of his rights. I refer, without further specification, to the plaintiff's letter to M'Adam, and to the memorandum of agreement sent by him to M'Adam for his signature. When, therefore, M'Adam, under these applications, gives the plaintiff the document of the 27th of October 1843, I must understand him as giving it, not as an original proposal, but as an acknowledgment of the pre-existing right, which the plaintiff claimed; and the plaintiff does not lose the benefit of that acknowledgment, so far as it goes, because he complains (perhaps truly) that it gives him less than he is entitled to. The admission in Hamilton's answer carries the case much

(16) 4 Myl. & Cr. 134.

further against him; for what M'Adam said to him, before he made his bargain with M'Adam, and paid his purchase-money, was an admission by M'Adam of the plaintiff's interest in the land, and, therefore, binding on Hamilton: it would have been evidence against M'Adam, and is, therefore, evidence against Hamilton, claiming under M'Adam, by a conveyance subsequent to that admission. The admission in the answer is not evidence against M'Adam's devisees, because the answer of one defendant cannot be read against the other. The letters and documents sent by the plaintiff (the letter I before referred to) are not evidence under the Statute of Frauds; but if the question be one of fact, whether the plaintiff had an interest or not, I will not say that a claim, repeatedly made, and never denied by M'Adam, is a circumstance of no weight. As far as the question, therefore, depends on the Statute of Frauds, it appears to me that the cases I have referred to are cases to the benefit of which the plaintiff is entitled.

Three further points remain to be noticed. It was said by the defendants that there was no consideration, or no adequate consideration, for the original agreement; secondly, that nothing had been done under it by the plaintiff; and, thirdly, they relied on the fact of his having gone from Birkenhead, and taken up his residence at Cheltenham. Now with regard to the first question,—want of consideration, I retain the opinion I expressed during the argument. If a man has skill, and no capital to make that skill available, and the other has capital, and no skill to make that capital available, and the two agree that the one shall provide the capital and the other the skill, it is perfectly clear that there is a good consideration for the agreement, and it is impossible for me to measure the quantum of value. The parties must decide that for themselves. With regard to the second point, that nothing has been done, it appears to me that all that was required of the plaintiff had been done up to the time that the dispute arose; at all events, enough had been done to subject him to a share in the loss, if a loss had been incurred: and if so, it must follow of course, that he has done enough to entitle him to a profit, if a profit has been made, and the case is right in other respects. In po fact it appears to me that, until the di arose, he had done everything that cou required of him to be done; and, per the time for the most important part not arisen. With regard to the remov Cheltenham, it appears to me that he now, according to the evidence, perha terms expensive to himself, have don act on behalf of the parties, according t terms of the contract. It is not sugg that any benefit has been lost up tc time by his not having done so. It ap to me a strange proposition for the d dants to say, that he has no right wha on this contract, and yet they require he shall remain there with his right de until the Court shall have come to a clusion on the subject. It appears t that there is nothing whatever in this re to deprive him of the benefit of the con if he is in other respects entitled to it.

Now, the difficulty of this case, and w as far as I am concerned, has been great, has led me to look into that wh may call the second branch of the The plaintiff says, if the case is withi Statute of Frauds, still that a trust is ciently manifested and proved by the morandum of the 27th of October 1 and though he objects to the terms of instrument, so far as it excludes him a voice in the matter, as to the time of ing the land, he prefers taking such as the document may give him, to h his bill dismissed. For the reasons I already stated, in commenting on the c ment I have referred to, I think the m randum of the 27th of October 1843, acknowledgment of an existing right does at least manifest and prove an int in the plaintiff to the extent therein s fied. But it was said, that interest ha yet ripened into a right in possession; therefore, the bill is premature. I an yet persuaded that such is the case. case of *Peck* v. *Cardwell* may be ar upon as shewing, that an agreement that in question is not determined b death of the parties; an argument w in one sense, is unfavourable to the plai But if that conclusion be admitted, it follow that the agreement between the ties binds them to sell at the proper whenever that time may arrive; anc

question which I have considered is, whether the attempt at partition will not, if carried out, so completely destroy that unity and entirety of interest, which is essential to the performance of the original contract, that the Court is bound at least to prevent it; or whether that circumstance coupled with the unqualified denial of the plaintiff's interest, and his actual exclusion from the land, is not such a determination of the original contract as will entitle him now to a decree for the sale. I have found, however, after giving to each branch of the case the best consideration I could, so great a difficulty in the way of decision founded upon it, that I think I shall best consult the interest of both parties and the justice of the case, by doing that which the plaintiff asks: by directing such inquiries as shall try the truth of the statement in the bill, the truth or falsehood of which must be in the knowledge of the plaintiff. I shall direct two issues, the terms of which I should wish the parties to speak to. The first will be, whether before the 16th of October 1843 (I will make an observation on that date immediately,) it was agreed between the plaintiff and M'Adam that they should be jointly concerned in speculations for buying, improving, and selling land at Birkenhead. And the second issue I think the defendants will be entitled to, if the verdict shall be for the plaintiff on the first issue: namely, whether it was a term in such agreement that the plaintiff should have no power or authority in determining when the land purchased in pursuance of such agreement should be re-sold. The plaintiff in equity to be the plaintiff in the first issue; the defendants in equity to be the plaintiffs in the second issue.

I have named the 16th of October 1843, which is later than the time of the alleged original agreement, in order to cover what is the real justice of the case, and on the authority of what is said throughout the case of *Forster* v. *Hale*, that if the evidence does not prove the agreement at the beginning, it is sufficient that it is subsequently shewn.

WIGRAM, V.C. May 28, 29; Nov. 18, 19; Dec. 2. } PRESTON *v.* WILSON.

Insolvent — Title to sue — 5 & 6 Vict. c. 116.—Power of Commissioners—Objection taken at the Hearing.

In 1842, *A. mortgaged certain leasehold property to B. In May* 1843, *A. filed his petition under the* 5 & 6 *Vict. c.* 116, *and in July following obtained his final order and protection. In November* 1843, *A. filed his bill against B. and the official assignee in bankruptcy, to redeem, alleging that he had fully satisfied all his scheduled creditors under the insolvency. The official assignee by his answer disclaimed, and submitted to act as the Court should direct. Upon objection, at the hearing, that A. had no title to sue, his whole property being vested in the official assignee by the final order made in the insolvency, the Court refused to dismiss the bill on the ground of want of title, there being no power in bankruptcy, under the act or otherwise, even after all the insolvent's debts were satisfied, for superseding the insolvency or re-conveying the property to the insolvent.*

Quære—*Whether the objection would have been good if taken by way of demurrer.*

In 1842, the plaintiff mortgaged certain leasehold houses, situate in the neighbourhood of Bethnal Green, to the defendant Wilson, to secure the sum of 1,240*l.* In May 1843, the plaintiff filed his petition in bankruptcy under the 5 & 6 Vict. c. 116; and in July following, obtained his final order and protection. On the 7th of November 1843, the plaintiff filed his bill to redeem the mortgaged property, stating that, a short time after the 4th of March 1843, the defendant Wilson was in the possession of and in the receipt of the rents and profits of the mortgaged estate, and it prayed redemption as against a mortgagee in possession. The defendant Wilson, in his answer to the original bill, alleged that the value of the premises did not exceed the mortgage money due; that some time in Midsummer 1843, the plaintiff accompanied him to the tenants and introduced him to them as their future landlord, and that the plaintiff, being satis-

fied that the equity of redemption was worth nothing, represented to the tenants that he had nothing further to do with the property, and that after Midsummer 1842 he, the defendant, was in the possession of the estate; that being unable to sell the property, and to avoid the expense of a foreclosure suit, he accepted the plaintiff's offer to convey the equity of redemption to him for 5*l.* 5*s.*, which sum was paid; that the defendant had disbursed in repairs or otherwise an amount exceeding the rent; and that if the plaintiff were entitled to treat the defendant as a mortgagee, he believed the money due upon the mortgage would amount to 1,800*l.* The defendant also stated in his original answer, that in May 1843, the plaintiff had presented his petition under the act for the relief of insolvent debtors, and that an order had been made by the Court of Bankruptcy upon the petition for the protection of the insolvent; and that the estate and effects of the plaintiff, by the operation of that act, were then vested in Turquand, the official assignee; and the defendant submitted, that, under the circumstances stated in his answer, the plaintiff had no estate or interest in the premises, and that the equity of redemption, if any, was vested in such official assignee; and that he was a necessary party to the suit.

On the 16th of April 1844, the amended bill was filed against Wilson and Turquand. The amended bill stated, that by an arrangement come to in June 1842, one S. was appointed receiver of the rents of such of the houses as were let to weekly tenants, and that Wilson was in the possession of the residue; that this arrangement was acted upon up to October 1842, when S. was discharged, and the defendant was then in possession of all the mortgaged property. The bill then charged, that at the end of the year 1842, the property was worth 3,000*l.*; that the plaintiff did no more than direct the tenants to pay their rents to Wilson as mortgagee; and the bill then contained this charge, "that while the plaintiff was greatly embarrassed in his circumstances, W. Hodson, as the agent of the defendant Wilson, on the 17th of December 1842 wrote to the plaintiff, requesting him to meet him at a beer shop in the City Road, and that he, W. Hodson, would be able to put a sovereign in his pocket; that the plaintiff attended at the time and place, and met W. Hodson and the defendant W in company; that W. Hodson then duced a paper writing, stating that W was in possession of the property, an foreclosed the equity of redemption, asked him to sign a paper, as the te would require to see some document, a rizing the collection of the rents; where W. Hodson presented a paper writi the plaintiff, which the plaintiff si under the belief of the misrepresentati W. Hodson, that the paper was mere authority to the tenants to pay their to Wilson; that, after the plaintiff signed the paper, Wilson gave him 5*l.* that the document so signed by the pl was never read over to him or expl otherwise than as aforesaid, previou the signing, and the real nature thereo concealed from the plaintiff until 1843." The bill then charged, tha equity of redemption was of great and that 5*l.* 5*s.* was an inadequate sideration. And with reference to the ceedings in bankruptcy, the bill stated all the creditors had been paid, and th claim was made by the official assig and the bill prayed, that the alleged a ment might be cancelled and the acc taken, and that the plaintiff might be to redeem the premises.

The answer of Wilson to the ame bill suggested, that, after he was en to receive the rents, the plaintiff pered with the tenants, and that difficulty was experienced in collectin rents; and he insisted, that the o ings of the premises had exceeded amount of rent received; and it then s the offer of the 5*l.* 5*s.*, and that the me at which the agreement of the 17 December 1842 was signed, was he the office of the defendant, and not beer shop; and that it was first read and the true nature thereof understoo the plaintiff; that the 5*l.* 5*s.* were and that the defendant then offered redeemed, if the plaintiff would pa amount of the mortgage debt. The was then re-amended and an answer p by which the defendant Wilson in that 5*l.* 5*s.* was the full value of the e of redemption. The answer of Turq stated, that the plaintiff did present

petition on the 18th of May 1843, and that in the schedule to his petition, no mention was made of the equity of redemption of the mortgaged property; but that, in an extra balance-sheet filed therewith, mention was made of the equity of redemption in these terms: "January 1841. By cash borrowed of D. Wilson, upon mortgage of the lease of the D—— estate, upon which he foreclosed for 1,650*l.*" (The plaintiff's case was, that W. Hodson prepared that schedule, and that was his excuse for the omission.) Turquand's answer further stated, that on the 23rd of November 1843, the plaintiff filed in the Court of Bankruptcy, in the matter of the bankruptcy, an affidavit of one Faulkner, to the effect that the plaintiff in May last filed his petition, and complied with the provision of the act 5 & 6 Vict. c. 116; that the plaintiff did on the 6th of June pass his first examination; that on the 11th of July he obtained his final order and protection; that the petitioner had well and truly satisfied the whole of the debts of the persons whose names were set forth in the schedule, and had obtained from each their discharge, dated in October last; and that no provision was made under the act of parliament for the purpose of taking off the files the petition and schedule. Turquand then stated by his answer, that after the filing of the affidavit, on the 20th of March 1844, he was applied to to execute a final release to the plaintiff of all his estate and effects; and he stated the reasons, under which he was advised not to make himself responsible by executing such release; and that he, Turquand, had no right of, in, or to the said equity of redemption, and he disclaimed all such interest, if any; nevertheless, he was ready and willing to act as the Court should direct, on being indemnified and paid his costs.

The case was afterwards at issue, and witnesses were examined. In this state of the proceedings the case came on in May last, when it was proposed by the counsel of the defendant Wilson, and assented to by the other side, that the question, whether the plaintiff's interest was not wholly in the official assignee, should be first argued as a preliminary objection. The case was argued on the 28th and 29th of May 1846, and Turquand appeared and submitted to any order which the Court might make.

Mr. Rolt and *Mr. Waley*, for the defendant Wilson, insisted, that the plaintiff, having taken the benefit of the act by filing his petition in bankruptcy, had no title to sue; his estate being absolutely vested in the official assignee. The disclaimer by the official assignee did not revest the estate in the plaintiff—*Major* v. *Aukland* (1).

Mr. Romilly, for the plaintiff.—As there is no mode given by the act of superseding the bankruptcy, and no provision by which the petition can be taken off the file, when all the debts are paid the proceedings are suspended, and the official assignee is a bare trustee for the bankrupt. In the case of *Major* v. *Aukland*, the creditors were not paid in full; and, therefore, there was a beneficial interest in the assignee. In the present case, there is no power in the act authorizing the commissioners to order the official assignee to reconvey to the bankrupt—*Saxton* v. *Davis* (2). The plaintiff has a right to come into equity, as he has no other remedy.

Mr. Rolt, in reply.—Other creditors besides those in the schedule have an interest in the insolvent's property—*Borell* v. *Dann* (3), and *Lautour* v. *Holcombe* (4).

The judgment upon the point was reserved until the whole case had been argued, which took place on the 18th and 19th of November last.

Dec. 2.—WIGRAM, V.C.—In consequence of the difficulty I felt in coming to any satisfactory conclusion, I thought it right to have the whole case first argued, in order that if my judgment were unsatisfactory, the Lord Chancellor might rehear it. The case having been argued, I have now to state the conclusion to which I have come. I had occasion to consider this point in the cases of *Tarleton* v. *Hornby* (5) and *Thompson* v. *Derham* (6); and on both occasions I was strongly impressed with the necessity of maintaining to the full extent the exclu-

(1) 3 Hare, 77.
(2) 18 Ves. 72.
(3) 2 Hare, 440.
(4) 8 Sim. 76; s. c. 5 Law J. Rep. (N.S.) Chanc. 323.
(5) 1 You. & Col. Exch. Cas. 172.
(6) 1 Hare, 358; s. c. 13 Law J. Rep. (N.S.) Chanc. 354.

sive jurisdiction of the Court of Bankruptcy, in a case committed to that jurisdiction; and I adhered to that opinion in the case of *Major* v. *Aukland;* and if it were clear that the power of the commissioners under the 5 & 6 Vict. c. 116, and the subsequent act, 7 & 8 Vict. c. 96, were co-extensive with their power under the Bankrupt Act, and the cases under these acts were amenable to the jurisdiction of the Court of Review, in every respect as in bankruptcy, I should have thought it best to tell the plaintiff, that he must, by a proceeding before the commissioners who are charged with the execution of the act, reinstate himself in the clear ownership of the property, before he applied to this Court to treat him as such owner. But the difficulty in the way of a decision in the present case is, that the jurisdiction of the commissioners in bankruptcy is a limited jurisdiction; they have not any original or general jurisdiction, in which cases of a given class would fall of themselves. The powers of the commissioners being derived from the statutes are limited by the statutes themselves. The statutes have given to the commissioners powers adequate to the duties with which they are charged in administering the estate of the insolvent and calling the assignees to account;—a power in certain specified cases to dismiss the petition; but no express power to compel the assignees to assign the surplus to the bankrupt, or to dismiss the petition or take it off the file, in a case like the present. The statutes give no appeal, in terms, from the judgment of the commissioners to the Court of Review; and it has been decided by the Court of Review, that the relative position of the commissioners and the Court of Review, in matters of bankruptcy, does not, necessarily, carry with it such right of appeal in every case in which a duty has been cast by the act upon the commissioners—*Ex parte Newland* (7).

In the present case it is stated at the bar, that the plaintiff had endeavoured without success to put himself into that position in which I have before suggested he would, in an ordinary case, be required to place himself. I cannot regard as matter of fact what is so stated, and no evidence of the fact is produced; but the result of the inquiries I have made is this, that if the plaintiff had made that application, which he tells me he has made, the result would have been that which he states. What the proper decision of this case would have been upon demurrer, if the defendant Wilson had demurred, or the official assignee had resisted, it is not necessary to say. There are many cases in which the Court holds at the hearing, that the objection which if argued on demurrer might be good, may be removed at the hearing by the different nature of the question to be found upon the whole of the pleadings. In the present case, having regard to the difficulty stated by the answer of the official assignee, and the offer made at the bar by his counsel to submit to any decree the Court shall make, I think I ought not, whatever the leaning of my own opinion may be,—the statute containing no express provision,—to dismiss the bill only on the ground of want of jurisdiction. The judgment in *Tarleton* v. *Hornby* contains an historical account of the Court of Bankruptcy, to deal with the bankrupt and his assignees. What form of decree is to be made to prevent any injustice being worked to the creditors is another question. The plaintiff will get no decree without submitting to such terms as the justice of the case may require.

His Honour, then, after commenting upon the evidence, stated that he should direct two issues — first, whether before the 17th of December 1842, there had been any agreement between the plaintiff and the defendant Wilson, that the plaintiff should sell to Wilson the equity of redemption; secondly, whether at the time of signing the paper of the 17th of December 1842, the plaintiff knew the contents, purport, and effect of that paper. The defendant in equity to be plaintiff at law.

(7) 1 De Gex, 115.

V.C. Dec. 23. } BROWN *v.* COOKE.

Injunction — Copyright — Statute 5 & 6 *Vict. c.* 45.

Upon motion for an injunction to restrain the sale of a periodical containing articles

opied from the plaintiffs' Gazette, it was eld that the plaintiffs had not made out such title to the copyright in the articles as was required by the statute 5 & 6 Vict. c. 45, since it appeared that although the editor was paid for supplying the articles and other contributions upon the terms that all copyright in the Gazette and in all literary matters supplied thereto should belong to the plaintiffs, yet it was not stated that the contributors had been actually paid for their contributions. Injunction refused, with liberty to the plaintiffs to bring an action.

This was a motion for an injunction respecting the alleged infringement of a copyright. The circumstances of the case were as follows:—The plaintiffs were the firm of Messrs. Longman & Co., of Paternoster Row, who were the publishers and proprietors of a weekly periodical called the *London Medical Gazette*, dedicated, for the most part, to subjects of medical and surgical science, and which was first produced in the year 1827. A new series of the work was commenced in the month of April 1845, and one and the same person had continued editor from that period up to the date of these proceedings, under an agreement with the publishers, by which the editor was to receive, and under which he had received, a considerable yearly salary, in consideration of which he was to supply, and had supplied, all the articles, dissertations, and literary matters for the *Gazette*; all of which articles, dissertations, contributions, and literary matters had been written by persons who had been paid for so doing, and who had supplied them to the *Medical Gazette* on the express terms that the copyright should belong to and be the property of the plaintiff Brown and his partners. The defendant was the printer and publisher of another weekly periodical of the same description, entitled the *Medical Times*. The plaintiffs alleged that a great number of original articles which had been expressly written for and had been published in the *London Medical Gazette*, and for which the respective authors had been paid and remunerated by the publishers of that periodical, had been copied from time to time into the *Medical Times*, and that the said articles and other matters so copied had lately increased to a very material extent. The plaintiffs had set out a number of articles and passages from articles which had been taken, with very slight alterations, from the plaintiffs' work. The injunction now asked for was to restrain the defendant, Michael Cooke, from selling or disposing of any numbers or parts of the *Medical Times* containing any article, communication, matter, or thing copied or taken from the *London Medical Gazette*. The defendant, in his affidavit, stated, that some of the authors of the articles which it was alleged he had pirated had actually requested him to insert them in his journal, and, in some instances, had abridged them in the form in which they were inserted; that the abridgments were perfectly fair, for it appeared that more than 127 columns had been abridged into a tenth of that space; that, consequently, they were not such as the Court would restrain.

Mr. Bethell and *Mr. Renshaw*, in support of the motion, contended, that the plaintiffs had a copyright in the articles published in the *Medical Gazette*, under the statute 5 & 6 Vict. c. 45. s. 18. (1); that

(1) By section 18. it is enacted, "That when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopaedia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be *composed* under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and *paid for* by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only, that, in the case of essays, articles, or portions, forming part of, and first published in, reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act: Provided always, that, during the term of

the defendant had clearly infringed this copyright, by copying into his work a variety of articles first published by the plaintiffs. In one number of the *Medical Times* there was a portion of the paper set apart for such articles, to which the following heading was prefixed:—"These are the only articles of interest in the last three numbers of the *Medical Gazette*." So that the defendant had not only taken what he considered to be the only articles of interest, but, by the above statement, he had depreciated what he actually copied. It was true that the consideration was paid, in the first instance, to the editor, by the proprietors, but the contributors were paid by the editor: so that would not prevent the plaintiffs from having a copyright in the contributions. It was expressly stated in the defendant's work that the articles were copied from the plaintiffs' *Gazette;* and the plaintiffs, by their affidavit, set forth that the copyright was in them, and that the contributions had been paid for by them: whether such payments were made to the editor or the contributors themselves would make no difference.

The following cases were cited for the plaintiffs:—

Rundell v. *Murray*, Jac. 311.
Lewis v. *Fullarton*, 2 Beav. 6; s. c. 8 Law J. Rep. (N.S.) Chanc. 291.
Butterworth v. *Robinson*, 5 Ves. 709.
Dickens v. *Lee*, 8 Jur. 183.

Mr. Rolt and *Mr. Fooks*, for the defendant, contended, that the plaintiffs had no copyright in the articles published in the *Medical Gazette*. It was stated, upon the affidavit in support of the motion, that the editor was paid for the contributions in fact, the articles were written by a ber of contributors, and there was n gation that such contributions were for. The editor might have procur articles from friends without payme he might have taken them from s common to both; but unless the pla could shew that they had paid for articles, they had no copyright in under the statute. It was also cont that there had been only such copyin the plaintiffs' work as was fair and u all literary publications; it was co for all journals to take from each o portion of their contributions, and i injunction were granted, it would alt tirely the system upon which every p cal was conducted.

The following cases were cited:—

Wilkins v. *Aikin*, 17 Ves. 422.
Dodsley v. *Kinnersley*, Amb. 403
Trusler v. *Murray*, 1 East, 363,
Perceval v. *Phipps*, 2 Ves. & Be

The VICE CHANCELLOR.—I cann think that before I interfere to sto publication, the matter must be tr law, and for this particular reason:— my attention was first called to the guage of the plaintiffs' affidavit, as trasted with the language of the 18th s of the 5 & 6 Vict. c. 45, I was struc this, which has rankled in my min consequently I studied the section, in to see whether the thought that first me was such that I could remove, o ther it does not still operate, and w effect ought not to be given to this extent: that it appears to m plaintiffs have not by their affidavit ently made out that sort of derivative right which, under the act of parli they might have obtained, and for a know have obtained. I will state e how it occurs to me upon the 18th s The object of the act of parliament was to give a new species of copyri periodical works: by which I mean t it once for all understood, a work that out from time to time and is miscell in its articles; and then the act says it enacted, that when any publisher o person shall, before or at the time

twenty-eight years, the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been, or who shall be, so employed as aforesaid, to publish any such his composition in a separate form who, by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right, shall be entitled to the copyright in such composition, when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector publisher or conductor as aforesaid."

passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct and carry on, or be the proprietor of, any encyclopædia,"—and then follows several other words, in which a periodical work is found—"and shall have employed, or shall employ, any person to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in, or as part of, the same, and such work, volumes, parts, essays, articles, or portions, shall have been, or shall hereafter be, composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for."—Now, it seems to me, that there is an inaccuracy in the language, and the only possible way of making it English would be, by referring the words "and paid for," to the former words, "shall have been or shall hereafter be composed," &c.—"the copyright in every such periodical work, published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act." The words are, "shall have been, or shall hereafter be, composed on the terms," that is, that the publisher shall have employed the person to compose on the terms that the copyright therein shall belong to such proprietor or publisher, and be paid for by such proprietor. The copyright then shall belong to the publisher who has employed the person to make the articles, and has paid him for them upon the terms that the copyright shall belong to the publisher.

[*Mr. Bethell.*—Your Honour will pardon me for a moment for saying that that construction would have this effect, that if I sent to the *Quarterly* an article written by me, which is paid for, it would confer no copyright; because, according to the language of the act, there has been no antecedent employment of me.]

The Vice Chancellor.—I am not observing upon that, because I conceive that the payment is evidence of a thing at least tantamount to the employment. I am not putting it in that way.

[*Mr. Rolt.*—I am sorry to interrupt your Honour; it was not with a view to anything your Honour said, but what fell from Mr. Bethell. I wished to call the attention of the Court to some celebrated articles of Mr. Macauley's, which are now published in separate volumes, every one of which was written and paid for, and they all appeared in the *Edinburgh Review*.]

The Vice Chancellor.—I am now assuming what has been in my mind all along, that the meaning of the act of parliament, as I understand the language of it, is this, that if the publisher of a periodical work employs a person to write articles for him, and pays him for them upon the terms that the copyright shall be the proprietor's—that is, the proprietor of a periodical work—the proprietor shall have the copyright of the periodical work containing all the articles, with certain subsequent limitations, upon which nothing turns as far as this case is concerned.

Now, as I collect from the language of this affidavit, it represents this, that Messrs. Longman and their partners have been for a considerable time the publishers of this periodical work which is called the *Medical Gazette*, and in the month of April 1845, a new series was published, which is still continued. The affidavit represents that the *London Medical Gazette* consists, to a considerable extent, of original articles, &c., "written and composed particularly and expressly for this book, and that the said *London Medical Gazette* has been from time to time written, composed, and edited for me and my partners, by various persons who have been employed, paid, and remunerated by me and my partners for so doing." Then it continues—"and I say that the present editor of the *London Medical Gazette* has been the editor thereof ever since the publication of the new series,"—that is, since April 1845—"and that I and my partners have paid to the said present editor, during his employment as editor of the said *London Medical Gazette*, under an agreement to that effect, a considerable annual pecuniary salary; and that the said present editor, for the consideration or salary afforded, has supplied, and still does supply, all the articles, dissertations, communications, and so on, and matters printed and published in the said *London Medical Ga-*

zette, but upon the terms that all copyright in the said *London Medical Gazette*, and in all communications, &c., shall belong to me and my partners."

Now, if the case had been meant to remain upon that statement, I should have put this construction upon the language of it, that ever since the month of April 1845, the present editor has himself composed all the articles which are printed in the *London Medical Gazette;* but, upon turning to subsequent pages, it is quite plain that that is not so. The present editor has been paid; but it appears that, whatever may have passed between him and the original composers, there is no allegation, as I understand it, that the original composers have been paid for the copyright in their compositions. And when I find a statement *seriatim*, of a variety of articles which have been composed by several gentlemen whose names follow, I have then this fact presented to me, that Messrs. Longman have not dealt with them by payment, but have dealt in this way: that they have paid their editor, and whether the editor has paid those gentlemen who so composed does not sufficiently appear upon this affidavit. The fact is, the affidavit is silent as to that; and if, therefore, I find the fact to be, on the face of the affidavit, that A, B, and C. have composed articles which, by reason of some dealing between them and the editor, who alone has been paid by Messrs. Longman, these articles have by the editor been inserted in this *Medical Gazette*, which is published by the plaintiffs, it appears to me, if that be the statement of the facts taken altogether, that then the Messrs. Longman have not entitled themselves to the copyright which is given under the terms of the 18th section, as the publishers of the periodical work, who pay the composer of each article inserted therein upon the terms that the copyright shall belong to them as the publishers.

Now, it may be, and it is certainly very possible, consistently with what is here stated, that the matter has been overlooked, and that the substance of the case may be, that the editor himself has been employed as a sort of agent, in an honorary way, to deal with these gentlemen, who themselves composed the separate articles, and that he has paid them; and it may be true that the payment may have been in such a m that, in point of law, it ought to b as a payment made by Messrs. Lo but my opinion is, that there is infirmity in the statement on this of the terms, which, according to t guage of the 18th section, will copyright in the publishers, that I think at present I am authorized t fere though it certainly does appea that there is some sort of case ma I do not say now to what exte also appears to my mind that it ne be said, according to the express la and within the spirit of this 18th that if persons do become limited ov the copyright in original compositio lished by them in their periodical any other person who is the own periodical work has a right to tak them, without stint and to any exte cannot be the law—it appears to would be contrary to the express en of the statute, and, at any rate, con common honesty, and, it rather ap my mind, to common sense. But opinion is, that there is this infirmit the mode of stating the title in th ner I have represented, that I thin can do at present is to direct that t ter stand over, and that the plaintif liberty to bring such action as they advised, in the usual manner.

L.C. Dec. 22. } RICHARDSON *v.* MOOR

Bill—Name of Plaintiff's Sol Staying Proceedings—Order in Ab Party affected by it—Irregularity.

Where the person whose name was to a bill as the plaintiff's solicitor wa solicitor of the court, an order directi the name of a solicitor should be sub and that the registrar should satisfy that the proposed person was a s and also directing that all further p ings against the defendant should be the plaintiff not being present at the of the application for the latter par order, or having had notice of it, w charged for irregularity.

In this case, the party whose name was affixed to the bill as the plaintiff's solicitor was not a solicitor of this court. A motion was made before Vice Chancellor Knight Bruce, to take the bill off the file upon that ground, when his Honour, at the request of the plaintiff's counsel, said, that he would allow the name of a solicitor to be substituted, and the solicitor was to declare his willingness to allow his name to be used, and the registrar was to satisfy himself that the person who should be proposed was a solicitor of this court. No step having been taken by the plaintiff, the matter was mentioned again to his Honour a few days afterwards by the defendant's counsel, without notice to the plaintiff, and his Honour then ordered that all proceedings against the defendant should be stayed until further order (1).

The plaintiff now moved that that order might be discharged.

Mr. Cooper and *Mr. Daniel* supported the motion, and contended, that the practice of the Court did not warrant such an order had been made in this case.

Mr. Toller opposed it.

The Lord Chancellor said, that the order appeared open to several objections, but the fact that the latter part of it was made in the absence of the plaintiff, and without notice to him, was alone sufficient to induce him to discharge it.

K. Bruce, V.C. Dec. 4. } COTGREAVE *v.* COTGREAVE.

Will—Construction—Power.

A power was given to a tenant for life to charge real estate with any sum not exceeding 2,000l., for the portions of his younger children, to be paid to them at such times as he should appoint:—Held, that he had the power of making an unequal division of the 2,000l. among his younger children.

Thomas Cotgreave, by his will, dated the 9th of January 1790, devised his real estate to John Johnson, afterwards Sir John Cotgreave, for life, with remainder to William Johnson for life, with other remainders over.

The will contained a power for J. Johnson and W. Johnson, when they should be in possession of the property, and in case they, or either of them, should have issue of their respective bodies an eldest son and one or more younger sons or son or daughters, by deed or will to charge the premises, by way of mortgage for a term, with any sum not exceeding 2,000*l.* each, for the portions or portion of any daughters or younger sons of them, the said J. Johnson and W. Johnson, other than an eldest or only son, to be paid to such daughters or younger sons respectively at such times or time and with lawful interest for the same in the mean time, for or towards the maintenance and education of such daughters or younger sons respectively, as the said J. Johnson and W. Johnson, by such their respective deed or deeds or last wills and testaments, should direct, limit, and appoint.

The testator died in 1791.

Sir J. Cotgreave, having an eldest son and several younger children, by a deed-poll, dated in July 1824, directed that 1,500*l.*, part of the 2,000*l.*, should be divided equally between two of his daughters (naming them), and that 500*l.*, the remainder, should be divided equally among his other younger children.

Upon a petition presented in the cause, a question was raised whether Sir J. Cotgreave had the power, under the terms of the will, of making an unequal division of the 2,000*l.* among his children.

Mr. Malins and *Mr. C. Hall* contended that Sir J. Cotgreave had such power.

Mr. Bacon contended that Sir J. Cotgreave had no power to make an unequal division among the children.

Mr. J. V. Prior, *Mr. Jolliffe*, and *Mr. R. M. Richards* for other parties.

Knight Bruce, V.C. said that he had no doubt that, under this particular instrument, the right to distribute the fund in unequal shares was within the donee's power, and could not successfully be questioned.

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(1) See 15 Law J. Rep. (N.S.) Chanc. 424.

L.C. Dec. 11. } PENNY *v.* WATTS.

Pleading—Parties—Demurrer—Bill for Payment of Legacy, without Representative of Testator.

A testator bequeathed a legacy to A, and gave all the residue of his estate to his wife. She became the sole executrix, and afterwards married again and died; and her second husband possessed himself of all the testator's residuary estate. A bill was filed by the representative of the legatee against the second husband, stating that all the other legacies of the testator and all his debts were paid; that the defendant had a considerable amount of assets in his hands, and that he refused to take out administration either to the testator or to his late wife. A demurrer to the bill, upon the ground that a personal representative of the testator and of his executrix was necessary, was allowed, (reversing the decision of the Court below).

The bill, which was in some degree supplemental to a former suit, stated that Charles Bayley Unett, by his will dated in September 1821, bequeathed, amongst other legacies, a legacy of 2,000*l.* to his niece, Elizabeth Stone, who afterwards became the wife of the plaintiff, to be paid to her whenever the testator's wife might think proper; and he bequeathed the residue of his personal estate, and also all his real estate, to his wife Rebecca, who afterwards married the defendant Watts; that the testator died shortly afterwards, and his wife was the sole executrix of his will; that shortly before the marriage of the plaintiff and Elizabeth Stone, and in September 1835, the plaintiff's wife and Mrs. Unett entered into an agreement, by which the plaintiff's wife relinquished her legacy of 2,000*l.*, and Mrs. Unett agreed that she would, either by deed in her lifetime, or by her will, settle the real estates of the testator in such a manner, that, partly upon the death of other persons, and partly after the death of Mrs. Unett, they should become the property of the plaintiff and his wife in fee simple; that Mrs. Unett and the defendant intermarried in 1843, and that these estates were thereupon conveyed to the defendant in fee, he having notice of the agreement of September 1835; that Rebecca Watts (formerly Mrs. Unett) in April 1846; that, in answer to a fc suit instituted by the plaintiff against ' and his wife, Watts had admitted, anc the fact was, that the whole of the per estate of the testator had been receive Watts and his wife, or one of them, ai part remained outstanding; that al testator's debts, and funeral and mentary expenses, and all the legacie cept the legacy to the plaintiff's wife, paid, and that the defendant had poss himself of more residuary personal est the testator than was sufficient to pa legacy of 2,000*l.*; that the defendant became, on the death of his wife, en to her personal estate for his own us benefit; that there was no legal per representative either of the testator Rebecca Watts; and that the defe being entitled to administration o estates of both these parties, declin apply for administration to either of or to renounce his right thereto, and he thereby impeded the same being gr to any other person, and that he did so a view to prejudice the plaintiff. Th prayed specific performance of the a ment of September 1835, and for a co ance to the plaintiff of the testator' estates: or that the plaintiff might b clared entitled to the legacy of 2, bequeathed to his late wife, and if nece for an account of the testator's pe estate come to the hands of the defer and of the liabilities to which it was su in addition to the legacy of 2,000*l.*

The defendant demurred for wa equity and want of parties: the latter tion being grounded upon the fact there was no personal representative testator, or of Rebecca Watts, befor Court.

The Vice Chancellor overruled th murrer, and the defendant appealed that decision.

The Lord Chancellor having exp an opinion that there was sufficient to sustain the bill, overruled the ground of demurrer, and the second g of demurrer, namely, for want of partie then proceeded with.

Mr. J. Parker and *Mr. Bird* ap for the appellant, and contended th personal representatives of the testat

also of Mrs. Watts were necessary parties, before the suit could continue; that the Vice Chancellor considered, that if the plaintiff succeeded in getting a decree for the specific performance of the agreement of September 1835, and a conveyance of the real estates, the personal representatives of these two parties would not be necessary; but as the bill was framed, that question could not be gone into in the absence of those parties.

Mr. Rolt and *Mr. Bazalgette*, for the plaintiff, in support of the Vice Chancellor's decree, contended, that the defendant was personally liable to pay the legacy of 2,000*l.*, because the bill stated that the defendant had received assets of the testator more than sufficient for this purpose, and that all his debts and all other legacies were paid, and that all the statements must, of course, upon this demurrer be taken to be true—*Tyler* v. *Bell* (1); or the defendant might be regarded as an executor *de son tort*, and, in that case, he would still be bound to pay the legacy. But, even if a personal representative of these parties would be necessary according to the general rules of the Court, still, as the defendant prevented any person from assuming that character, and refused to take it upon himself, the Court would not allow the plaintiff to be injured by that course of proceeding, nor would the defendant be permitted to derive any benefit from his own wrong.

The LORD CHANCELLOR said, he was sorry that in such a case the plaintiff should fail upon such a point; but the practice of the Court required that a personal representative of the testator should be made a party, although it might here only create unnecessary expense. If a sum of money had been set apart to pay the legacy of 2,000*l.*, and was now in the hands of the defendant, in the character of a trustee, the Court would compel him to apply that specific fund for the particular purpose for which it had been appropriated. But, from the allegations in the bill, it was necessary for the Court to be satisfied of the fact that all the debts were paid: although the demurrer admitted it, and although the defendant might admit it, the fact must be proved by taking the accounts. The defendant, as an executor *de son tort*, might be charged with monies come to his hands, but he was not the personal representative of the testator.

The plaintiff might have taken proceedings in the ecclesiastical court to obtain administration: even if the defendant had opposed such an application, an allegation of a *lis pendens* in that court, would have been sufficient to sustain the bill.

The decision of the Vice Chancellor must be reversed, and the demurrer allowed; but the plaintiff must have leave to amend his bill.

(1) 2 Myl. & Cr. 106; s. c. 6 Law J. Rep. (N.S.) Chanc. 169.

K. BRUCE, V.C. Dec. 7, 10, 12. } *Ex parte* BOND.

Infant—Guardian.

Guardian of the estate of an infant appointed on petition without suit or reference.

Catherine Bond, an infant of the age of thirteen years, being entitled to leasehold property of the value of about 90*l.* a year, presented a petition, praying that her father might be appointed guardian of her estate, without suit or reference.

Mr. Rasch for the petition.

K. BRUCE, V.C. directed that the petition should stand over, in order that authorities might be searched for.

On a subsequent day *Mr. Rasch* cited—

Ex parte Clarke, 6th June 1653; Reg. Lib. 1652; A. f. 1106.

Ex parte Hampden, Feb. 7th, 1696; Reg. Lib. A. 1696, f. 469.

Ex parte Levinge, July 4th, 1797; Reg. Lib. B. 1796, f. 618.

Ex parte Reynell, March 8th, 1833; Reg. Lib. B. 1832, f. 1056, 1529.

Ex parte Salter, 3 Bro. C.C. 500.

Ex parte Mountfort, 15 Ves. 445.

KNIGHT BRUCE, V.C. said, that, on the production of a satisfactory affidavit as to the means and condition of the father, and on two sufficient persons entering into recognizances, he would take their security and appoint the father guardian.

The required affidavit having been produced on a subsequent day, and two persons having given a proper undertaking, the order was made according to the prayer of the petition.

V.C. Nov. 16. } GRAND JUNCTION CANAL COMPANY *v.* DIMES.

"*Copyholds*"—*Power to compel Admission—Company.*

By an act of parliament under which an incorporated company had power to purchase land for the formation of a canal, persons having property upon the line of the canal were to convey any right, title, or interest in such property to the company, by a conveyance in the form pointed out by the act. A copyholder in fee conveyed, under the act, his interest in certain lands to the company. Upon the death of the copyholder the lord of the manor refused to admit his heir or the canal company:—Held, that the heir of the copyholder ought to be admitted by the lord to the copyhold premises, and that such heir, when admitted, was to hold as trustee for the company, who were to pay the fines and fees upon the admission.

The bill stated that an act of parliament was passed on the 30th of April 1793, in the 33rd year of Geo. 3. for making a canal from the Oxford Canal Navigation at Braunston, in Northamptonshire, to join the River Thames near Brentford, in Middlesex; and it was thereby enacted that certain persons therein mentioned should be, and they were thereby united into a company for making and maintaining the said canal, and should for that purpose be a body corporate, by the name and style of "The Company of Proprietors of the Grand Junction Canal;" and the said company were empowered to purchase lands to them and their successors and assigns, for the use of the said navigation, and to make and complete a canal, to be called "The Grand Junction Canal," from and out of the Oxford canal, unto and through the several parishes and places therein mentioned, and, amongst others, through the parish of Rickmansworth, in Hertfordshire; and it was, by the 9th section of the said act, enacted, that it should be lawful for the said several corporations and persons therein mentioned, on behalf of themselves and others, and for every other person or persons whomsoever, who was, were, or should be seised or possessed of, or interested in any lands, grounds, and hereditaments, which should be set out and ascertained for the purpose of the said canal, to contract for, sell, or convey the same and every part thereof unto the said company of proprietors, and that all such contracts, agreements, sales, conveyances, and assurances, should be valid and effectual in law to all intents and purposes whatsoever; any law, statute, usage, or custom to the contrary thereof notwithstanding; and that such of them as should be made of any lands or other hereditaments to the said company of proprietors, should be made according to a form in the said act set forth. The bill further stated, that certain other acts of parliament were afterwards passed for enabling the plaintiffs to complete the canal and collateral cuts; and in one of the said acts, passed in the 41 Geo. 3, it was enacted, that if any contract concerning any lands thereafter to be purchased should be made or entered into of any such lands which should be copyhold, or of the nature of copyhold, the same should be executed and completed by surrender thereof, in the court of the manor of which the same was or were holden, according to the custom of the said manor, and such lands should continue subject to the same fines, rents, and services as were due and payable in the same manor, unless the lord or lady of the manor for the time being should be willing to enfranchise the same, in which case such lord or lady were empowered so to do; but that, inasmuch as the vesting and continuing of such copyhold premises in the said company, as a body corporate, would prevent such lord or lady from receiving such benefits of fines and other services due upon death, descent, or alienation, as if the property had continued to be the property of persons in their natural capacities, he, she, or they should be entitled to and should be paid by the said company a reasonable recompence and satisfaction for the loss that would arise to him, her, or them in respect of such fines and other services, the enjoyment of which would be diminished or lost by the vesting or continuing of such copyhold premises in a body corporate, which recompence or satisfaction, if not settled by agreement between the parties, should be ascertained and settled by arbitration in manner therein directed.

The bill then stated that Joseph Skidmore, of Rickmansworth, since c

ceased, was seised of or entitled to him and his heirs, at the will of the lord and according to the custom of the manor of Rickmansworth, of divers copyhold lands, held of the said manor, and amongst others for or to several fields situate in the line of the said canal, and were duly described in the maps or plans in the first of the said acts mentioned, and which were required to be taken for making the said canal; and that the plaintiffs, previously to the 13th of March 1797, contracted with the said J. Skidmore for the purchase of the said pieces of land, and that thereupon the said J. Skidmore conveyed and assured the said several pieces of land in manner and form prescribed by the said first-mentioned act, that is to say, by a deed-poll, executed on the 13th of March 1797, whereby the said J. Skidmore granted and released to the plaintiffs the said pieces of land, to hold to the plaintiffs for ever, by virtue and according to the true intent and meaning of the said act. That the said J. Skidmore, at the time of the execution of the said deed, also executed a bond to the plaintiffs for indemnifying them against the payment of all quit-rents, heriots, customs, and services which should thereafter be claimed or demanded by the lord of the said manor, in respect of the said premises. That at the time of the execution of the said deed-poll of the 13th of March 1797, Henry Fothergill Whitfield, Esq. was seised in fee of the manor of Rickmansworth; that he died in the year 1813, having, by his will, devised the said manor to trustees upon trust for sale; and that, some time after the death of the said H. F. Whitfield, and in the month of June 1818, the said trustees sold and conveyed the said manor to Robert Williams, Esq., who afterwards conveyed the same to William Windall, Esq., who subsequently, and in or about 1831, sold and conveyed the manor to the defendant William Dimes, and the said manor had ever since been vested in him. That the said J. Skidmore died, leaving the defendant Thomas E. Skidmore his heir, according to the custom of the said manor of Rickmansworth; and that Edmund Lucas, the trustee named in his will, accepted the trusts of the said will. That at a court holden for the said manor, after the death of J. Skidmore, the said E. Lucas was admitted to all the lands and hereditaments holden of the said manor, whereof J. Skidmore died seised, and which were devised to the said E. Lucas, to hold unto the said E. Lucas, his heirs and assigns for ever, upon trusts declared by the will of the said J. Skidmore, but that such part of the lands as then formed part of the said canal were expressly excepted in such admittance, and the said premises to which the said E. Lucas was admitted, did not comprise any part of the premises of the said deed-poll conveyed or assured as aforesaid. That by the custom of the said manor of Rickmansworth, the lord of the said manor, upon every descent of copyhold premises holden of the manor, was entitled for his fine to two years' improved value of such premises; and upon the death of a copyhold tenant, if no person should appear to be admitted to the premises whereof such copyhold tenant died seised, the lord of the manor was entitled, after certain proclamations had been made, to seize such copyhold tenements, and take the rents and profits thereof; and that no person having, upon the death of the said J. Skidmore, claimed to be admitted to the said copyhold premises, the said defendant, W. Dimes, claiming to be lord of the said manor, caused proclamations to be made in the proper form, and issued a warrant for seizing the same into his own hands as lord of the said manor. That the said defendant, W. Dimes, commenced an action of ejectment against the plaintiffs, for recovering possession of the said copyhold premises, which was finally decided in favour of the said W. Dimes, who thereupon sued out a writ of possession, and thereby recovered possession of the said premises, and caused a moveable bar to be placed across the canal, and gave notice to the plaintiffs that unless they paid the sum of 5,000*l.* before a certain day he would wholly stop the navigation of the said canal, and the said W. Dimes had since caused a large quantity of bricks to be thrown into the canal, for the purpose of stopping the navigation thereof. That, though the lord of the said manor might be legally entitled to recover the said copyhold premises as aforesaid, the plaintiffs were, nevertheless, entitled themselves to be admitted, or to have the defendant, T. E. Skidmore, or such other

person as they might appoint, admitted to the said copyhold premises; and that the plaintiffs applied to and requested the said W. Dimes to make such admission accordingly, the plaintiffs offering to pay the proper fine and fees in respect of such admission, according to the custom of the said manor; but the said W. Dimes refused to comply with such request. The bill prayed that the defendant, W. Dimes, might be decreed to admit the plaintiffs, or the defendant T. E. Skidmore, or such other person as the plaintiffs should appoint, to the said copyhold premises, the plaintiffs being ready and willing and thereby offering to pay such fines and fees as might be properly payable upon such admissions as aforesaid, and also submitting, if necessary, but not otherwise, to purchase, under the powers of the said acts, all the estate and interest of the lord of the said manor; and that in the mean time the defendant, W. Dimes, might be restrained, by injunction, from in any manner stopping, impeding, or obstructing the passage of the boats, barges, and other vessels along the canal, and from in any manner injuring the navigation thereof. When this bill was filed an injunction was granted, according to the terms of the prayer, by the Vice Chancellor of England; and, upon appeal to the Lord Chancellor, the injunction was continued, and the cause now came on for hearing.

Mr. Stuart, *Mr. J. Parker*, and *Mr. Busk* appeared for the plaintiffs.

Mr. Bethell, *Mr. Humphry*, and *Mr. Smithies*, for the defendant Dimes, contended that the bill, so far as it claimed admittance through J. Skidmore, must be dismissed. The contract was made under the act with Skidmore in March 1797, and was completed by a conveyance under the act; the effect of which was to transfer the copyhold estate, which J. Skidmore had, to the company. There was no interest left in Skidmore after the conveyance, and the Court could not now compel the lord of the manor to admit a corporation. The act of parliament contained no power under which the lord of the manor could be compelled to sell his estate and interest in the copyhold tenements. If the lord were to admit a corporation he would be deprived of the fines and fees to which he was entitled.

The cases cited in support of this ment were—

The Attorney General v. *Lewin*, 8 366; s. c. 6 Law J. Rep. Chanc. 204.

In re the Paddington Charities, 8 629; s. c. 7 Law J. Rep. Chanc. 44.

Peachy v. *the Duke of Somerset*, 1 447.

Weaver v. *Maule*, 2 Russ. & My

The Attorney General v. *the Du Leeds*, 2 Myl. & K. 343.

Tonkin v. *Croker*, 2 Lord Raym.

Wilson v. *Hoare*, 2 B. & Ad. 350; 9 Law J. Rep. K.B. 253.

Watkins on Copyholds, pp. 242, 2

Snook v. *Mattock*, 5 Ad. & El. s. c. 5 Law J. Rep. (N.S.) K.B.

Mr. Stuart, in reply, said, the qu now was, if J. Skidmore purported to vey the whole interest, whether he wa a trustee for the company as to that which he did not convey? It was ev that the act of parliament contemplate taking of copyholds; and if the conve under the act, which was executed i form prescribed by the act, passed part of the interest, and there being interest left which could not be passe heirs of Skidmore would necessarily r trustees of that which had not been veyed, and the company had a rig have their title from time to time fected by the admission of the rightfu unless the Court would compel the l admit the corporation at once.

The Vice Chancellor.—It strik that the difficulty in this case has from the fact, that at the time when t of parliament passed there was not cient consideration given to the ci stance, which, as I understand it, have been apparent, namely, that a p of the land to be taken was copyhold I think that if that had been suffic brought to the attention of the fram the act of parliament, there would been more special provision with resp the matter of the conveyance than w in the act itself. But, as it stands, it to me that the act has authorized an son who had any right, title, or inte the land by such a conveyance, the f

which is pointed out, to convey all his right, title, and interest therein.

Now, Mr. Skidmore was a copyholder in fee in the ordinary sense, and the corporation took from him, for valuable consideration, a conveyance in the very terms of the act; and the act of parliament, in the 4th section, declares "that it shall be lawful for any persons (describing them) who may be seised, possessed of, or interested in any lands, tenements, or hereditaments, to contract for, sell, or convey the same and every part thereof unto the said company of proprietors, and all such contracts, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law, statute, usage, or custom to the contrary thereof in anywise notwithstanding." And then the form is given, which form itself expresses that the party who uses it conveys;—the expression is, "grant and release to the company all his right, title, and interest." It appears to me that the act of parliament in this 4th section was providing for the conveyance by a party who had an interest, of that interest, and nothing more than his interest, and did not mean that, where a party by the stipulated form conveyed his interest, he should be taken to convey anything which trespassed upon the rights of others, or would tend to derogate in any degree from the right of others; but merely enabled him by a given form to convey his rights. Then the case is, that Mr. Skidmore, being a copyholder in fee, does, for valuable consideration, use this form of conveyance. Then what was the character which, according to the plain construction of the act of parliament, he sustained? Before he executed the conveyance, he was a copyholder in fee, who had a right, as against the lord, to have his copyhold fee of inheritance continued to him on admission from time to time of the heir of the party who was tenant upon the roll. I cannot conceive that the act of parliament could be so construed as to give this effect to the conveyance, that it should pass to the company at once the absolute right of the copyholder in the same sense as if he had surrendered to the corporation, and the lord had admitted the corporation. That I cannot conceive, because that would necessarily have had the effect of making the use by the tenant of the prescribed form of conveyance pass something which did not belong to him, namely, part of the right of the lord. Therefore I must take it that the proper mode of construing the act is this—that by that form of conveyance Skidmore passed all his interest in the land, subject only to this, that, for the purpose of continuing the inheritable interest in the land upon his death, by way of example, for I need not go into all the cases, upon his death that he retained the right,—because it did not pass from him on account of the lord's interest,—that he retained the right to be admitted by his heir for the purpose of continuing the copyhold inheritance to his grantee for valuable consideration; and therefore I do not think that he altogether ceased to be a copyholder, but remained a copyholder, he being a trustee of the remaining right which he had as a copyholder, for the purpose of giving full effect to that form of conveyance, which, in the way it was constructed, could not pass the whole absolute interest of the copyholder in the same way as if he had surrendered and the surrenderee had been admitted, but which did everything short of that. Then the lord himself admits by his proceeding that there was a copyhold tenant upon the roll, and upon the death of that copyhold tenant that he himself is entitled to seize *quousque*,—that is his case, and that case he has established at law. Then if he has a right to seize *quousque*, there is a corresponding right in the heir of the tenant on the court roll to say to the lord, "Now, I will be admitted upon payment of the proper fine;" and my opinion is, that the heir of the copyhold tenant has that right, and has it merely as a trustee for the corporation, and that the proper thing to be done in this case is to give effect to the whole transaction as far as you can, without violating the rights of any one. Therefore, it appears to me that it would be an extremely improper thing to direct that the corporation shall be admitted against the will of the lord; but my opinion is that the corporation has a right as against the will of the lord to say, "You, the lord, shall admit that person who *de facto* is the copyhold heir of the tenant upon the roll," who was Mr. Skidmore.

It may be true that Mr. Skidmore was not the tenant who died seised, but though it is not true that he died seised as against

the corporation, yet, for the benefit of the lord, whose interest the act never meant to affect, he must be taken to have died seised in the same sense as if he had not conveyed. If it is a mere question, whether Thomas Emmett Skidmore is the copyhold tenant who is entitled to be admitted, there must be some method taken to ascertain whether he is or is not. I say so for this reason, because the evidence has been stated to me in a general way, and I have not had the opportunity of considering it; but my opinion is, that it would be a useless thing to carry on a reference, when the parties may reasonably themselves agree upon the matter, either by the effect of the evidence, or by matters that they may know out of court.

[*Mr. Stuart* said he did not suppose that a reference would be wanted to inquire who was Mr. Skidmore's heir. Mr. Dimes would not incur the risk of that inquiry.]

[*Mr. Humphry* said—There might be a question whether or not this interest, which was outstanding, passed by the will of Mr. Skidmore to his devisees or had descended to his heir-at-law.]

The Vice Chancellor.—That appears to me to be a very nice ingenious question; and if the parties, for the purpose of throwing money away upon such an investigation, choose to do so, it is not for me to prevent them; but I shall leave all that alone, because, if the lord really means to dispute the fact that Thomas Emmett Skidmore is the customary heir, I must refer it to the Master to see who is the proper person to be admitted in right of Mr. Skidmore.

It was afterwards stated by *Mr. Humphry* that the defendants would waive a case, and would admit that the legal estate was vested in Thomas E. Skidmore.

The declaration then was, that Thomas Emmett Skidmore, the heir according to the custom of the manor, ought to be admitted to the copyhold premises in question; and, when admitted, was to hold as trustee for the plaintiffs, and the plaintiffs were to pay the fine and fees due upon such admission; and that it should be referred [illegible] the Master to ascertain the amo[illegible] plaintiffs to pay [illegible] Dimes; and then the plaintiffs to recover them over, together with the plaintiffs' own costs, against the defendant Dimes.

K. Bruce, V.C. Dec. 8. L.C. Dec. 22. } ANDERSON *v.* STATHER.

Traversing Note—Orders of May 1845.

The plaintiff, having served some of the defendants residing out of the jurisdiction, under the 4 *&* 5 *Will.* 4. *c.* 82, *and entered an appearance for them, and filed a traversing note under the* 52*nd Order of May* 1845, *moved, under the* 56*th Order of May* 1845, *that a copy of the traversing note might be served on them. Motion refused.*

This case is reported in 2 *Coll.* 209, and 14 *Law J. Rep.* (N.S.) Chanc. 377—the point decided being, that Mr. and Mrs. Johnson, and their infant children, who were residing out of the jurisdiction of the Court, ought to be made substantial parties to the suit. The case is again reported in 15 *Law J. Rep.* (N.S.) Chanc. 260, where the point decided was, that an appearance might be entered for the infant defendants, after service under the 4 & 5 Will. 4. c. 82.

The plaintiff having filed a traversing note against these defendants under the 52nd Order of the 8th of May 1845 (1)—

Mr. Bevir now moved, on the part of the plaintiff, under the 56th Order of May 1845, that a copy of the traversing note might [illegible] served on the defendants.

Knight Bruce, V.C. said, he th[illegible] the case was not within the 56th [illegible] which appeared to him to apply [illegible] within the 17th and 21st Orde[illegible] 26th of August 1841 (2), and [illegible] make the order.

Mr. Bevir, subsequently, ap[illegible] Lord Chancellor; but the Lo[illegible] said, he thought the case [illegible] *omissus* in the Orders, and th[illegible] grant the application.

(1) Ord. Can. 304; 14 Law J. [illegible] 289.

(2) Ord. Can. 170; 10 Law [illegible] 412.

BRUCE, V.C. Dec. 9, 22. } PEARCE v. PEARCE.

Privileged Communication—Solicitor and Client.

Whether a person, not under any fiduciary relation to, or having any community of interest with, any other person, who has made communication to a solicitor or counsel professionally, on his own behalf alone, relating to property which is not the subject of any suit or dispute at the time, can be compelled to disclose such communication—quære.

An estate was settled on A. for life, with remainder to his children as he should appoint. A. appointed to B, the eldest of several children, in 1834; *and in* 1836 *A. and B, who was only just of age, in consideration of money stated to be paid to A. and B, mortgaged the estate. B. made a devise of the property to A, and afterwards died. A. entered into an agreement to sell the property to trustees of the will of P, subject to the approbation of the Court in a suit instituted to administer the estate of P. By an order, made at the instance of A, M. was permitted to attend the Master on the inquiries as to the title; and all parties were to produce before the Master all books, papers, and to be examined on interrogatories. Interrogatories were allowed by the Master for the examination of A; in which, first, his communications with B. respecting the appointment and mortgage were inquired after; and secondly, his communications with his solicitor respecting them. A. excepted to the certificate of allowance:—Held, that A. was compellable to answer the first class of inquiries; but was not compellable, in that stage, to answer the second class—without prejudice, however, to raising the question in a subsequent stage.*

This suit was instituted to administer the estate of Robert Pearce, deceased.

By an agreement, dated the 7th of April 1845, Mr. Westron agreed to sell to the trustees of Mr. Pearce (who had power to purchase real estate) two estates called the Burrow estate and the Munscombe estate; subject to the approbation of the Court of Chancery in the cause of *Pearce* v. *Pearce*.

A reference was made to the Master to inquire whether the agreement ought to be carried into effect, and whether a good title could be made to the property.

An abstract of title was delivered by Mr. Westron, in which the following instruments and circumstances were stated:—

Mr. Westron was entitled in fee to the Munscombe estate, subject to a mortgage.

The Burrow estate was settled to the use of Mr. Westron for life, with remainder to such uses as he should appoint in favour of his children, or any of them.

By a deed of appointment, dated the 10th of July 1834, Mr. Westron appointed the Burrow estate to Miss Westron, his daughter, (the eldest of several children,) in tail, with a proviso that the appointment should be void, if Miss Westron, who was then under age, should die under twenty-one.

In April 1835 Miss Westron attained the age of twenty-one years.

By articles of agreement, dated the 4th of May 1835, in consideration of 1,900*l.*, stated to have been advanced to Mr. and Miss Westron, Miss Westron agreed to charge her interest in the Burrow estate with that sum.

By indentures, dated the 12th and 13th of April 1836, Mr. and Miss Westron barred the entail in the Burrow estate; and, in consideration of the sum of 1,900*l.* charged on the Burrow estate, and the mortgage debt charged on the Munscombe estate having been paid off by a new mortgagee, and a fresh advance of 300*l.* stated to have been made by him to Mr. and Miss Westron, they mortgaged both estates to the new mortgagee.

Miss Westron, by her will, devised all her property to her father, and died in the year 1839.

By an order made in the cause, dated the 22nd of December 1845, on the petition of Mr. Westron, it was ordered that Mr. Westron should be at liberty to attend the proceedings before the Master; and the usual reference was made to the Master to inquire as to the title to these estates, and "for better discovery of the matters aforesaid, the petitioner, Mr. Westron, and all other parties were to produce before the Master, on oath, all deeds, books, papers, and writings in their custody or power relating thereto; and were to be examined on interrogatories as the Master should direct."

Some interrogatories were accordingly prepared for the examination of Mr. Westron, and were allowed by the Master.

The interrogatories commenced by asking Mr. Westron as to what passed between him and his daughter respecting the appointment and the mortgage, and who was his solicitor in those matters.

The interrogatories then (somewhat abbreviated) proceeded as follows :—" Did any and what letters or correspondence pass between you and such solicitor relative to such appointment, articles of agreement, and indentures of mortgage? (being the appointment, agreement and mortgage of April 1836 mentioned in the abstract). If yea, what was the purport and effect of such letters and correspondence? Are such letters and correspondence in your possession or power? If yea, produce the same. Declare what has become thereof, and when you last saw or heard of the same. What conversations passed between you and such solicitor relative to the said appointment, articles, and mortgage? Did not your solicitor by your order lay before J. P, or some other and what counsel, some and what case, statement, or instructions relative to the appointment, agreement, or mortgage; or anything consequential or incidental thereto? If yea, produce them, &c. (as before). Did J. P, or some and what counsel write any opinion? If yea, produce, &c. (as before). Do you know whether Mr. Rudall appeared before the Master as your counsel, and on your behalf, and stated the opinion of counsel; and did he not make this statement in consequence of instructions from you or your solicitor?"

The interrogatories then inquired as to the letters, conversations, and communications to and with the solicitor after the execution of the instruments in question; and as to the bills of costs delivered by the solicitor.

Mr. Westron filed several exceptions to the Master's certificate of allowance. By the first, he excepted to the whole certificate; by the second, to all the passages relating to what passed between him and his solicitor taken together; by the third and fourth, to the passages relating to what passed between him and his daughter; and by the fifth, sixth, seventh, eighth and ninth, to the passages relating to what passed between him and his solicitor taken separately.

Mr. Russell and *Mr. Rudall*, for the exceptions.

Mr. Swanston and *Mr. Belt*, for the certificate.

The following cases were cited :—

Radcliffe v. *Fursman*, 2 Bro. P.C. 514.
Richards v. *Jackson*, 18 Ves. 474.
Preston v. *Carr*, 1 You. & Jer. 175.
Hughes v. *Biddulph*, 4 Russ. 190.
Bolton v. *the Corporation of Liverpool*, 1 Myl. & K. 88; s. c. 1 Law J. Rep. (N.S.) Chanc. 166.
Nias v. *Northern and Eastern Railway Company*, 3 Myl. & Cr. 355; s. c. 7 Law J. Rep. (N.S.) Chanc. 170.
Greenlaw v. *King*, 1 Beav. 137; s. c. 8 Law J. Rep. (N.S.) Chanc. 92.
Walsingham v. *Goodricke*, 3 Hare, 122.
Flight v. *Robinson*, 8 Beav. 22; s. c. 13 Law J. Rep. (N.S.) Chanc. 425.

In the course of the argument his Honour expressed an opinion on some of the exceptions, but reserved his decision on them generally.

KNIGHT BRUCE, V.C.—Since the argument upon the exceptions in this cause, I have considered not merely those on which I did not, but those also on which I did, express an opinion. The argument touched —indeed more than touched—a general question of some importance, the question, namely, of the liability to compulsory disclosure, or the exemption from such disclosure, of confidential communications made to a solicitor professionally, or to counsel professionally, where the communications related to rights of property, were made by an individual not under any fiduciary relation to, nor having a community of right or of interest with, any other person: were made merely on the behalf of the consulting person singly, and were not made during a suit, during a dispute, or after the threat of a suit; the disclosure being sought adversely, not from the solicitor or counsel, but from the consulting person himself.

Among the authorities mentioned with reference to this question, were *Radcliffe* v. *Fursman* (in the House of Lords), and *Richards* v. *Jackson* (before Lord Eldon). These two authorities were contended to

ıave established or recognized the liability f such consulting party to compulsory isclosure in a state of circumstances similar ı all respects to that which I have menioned. If this is so, the liability must, of ourse, be taken to exist. But I must say ıat I am not, and that I have never been, atisfied that the two decisions were, as to ıe former by the House of Lords, or as ı the latter by Lord Eldon, intended to stablish or recognize such a liability in ıch circumstances. Upon them, considerıg what the argument has been, it is, ıough perhaps not necessary, not, I think, uite out of place, that I should, on the resent occasion, make some remarks, not ırgetting that the one is, for what it inıded to decide, conclusive; and the other ır what it intended to decide, all but conusive.

Instances may, without much difficulty, e suggested of persons consulting solicitors r laying cases before counsel upon particuır subjects, being so circumstanced,—being ı such positions with respect to these ıbjects, as to be disabled (whatever their ecret views or private intentions might be) rom saying that they did so on their own ehalf solely, or on account of their own aterest merely. Is it improbable that the House of Lords, in deciding *Radcliffe* v. *Fursman*, considered Mr. Radcliffe in such ı situation with regard to the case of the contents of which he demurred to the discovery? Nothing turns probably, as far as the House of Lords is concerned, on that part of Lord King's decision, which was in favour of Mr. Radcliffe, for there was not a cross appeal. Mr. Radcliffe was trustee of the bonds for the respondent under the will of the mother, and trustee of the estates, on which the money, if any, due on the bond, was secured. The point decided having been decided on a demurrer, is it too much to say that the right inference to be drawn from the statement in the bill was, that the case stated for the opinion of counsel was one as to which it was not competent to the appellant to contend that it had been stated in his own behalf alone, or on account of his own interest alone? The question alleged to have been put to the counsel seems to have been as to the respondent's right—seems to have been in effect whether the appellant, as a trustee, had for the respondent's benefit a valid claim against himself in his private right. Much stress, I agree, ought not to be laid on the reasons to be found in appeal papers: they may serve to shew, however, what probably were the points argued; and in this instance one of the respondent's reasons was this: "For that the state of the said case was in an affair wherein the appellant was not merely concerned in his own right, but was a trustee of the bonds for the respondent; and a trustee of the estates which are liable to pay the same." The respondent's appeal case, I may observe, in passing, contains this remark:—"Note, the bill nowhere requires any discovery of the counsel's opinion." To this appeal Lord Hardwicke, who had been one of Mr. Radcliffe's counsel, referred to *Stanhope* v. *Roberts* (1), where, independently of the submission of the defendant, who had a double character, the plaintiff had, or may have had, a common right and interest in the draft ordered to be produced. The report in *Atkyns* certainly does not induce me to take a view of *Radcliffe* v. *Fursman* different from that which I should otherwise have.

With regard to *Richards* v. *Jackson*, Mr. Vesey's report does not notice the argument or mention any one counsel concerned in it; and the judgment ascribed to Lord Eldon is given *ex relatione*—it is not said of whom. I am unable, therefore, to read it with that trust in its correctness, with which in general this estimable and valuable reporter's accounts of Lord Eldon's judgments are justly read. Nor certainly am I satisfied that his Lordship treated or understood the decision of the House of Lords in *Radcliffe* v. *Fursman* as recognizing or establishing the proposition, that, if a man, with relation to his own private interests merely, upon a point on which he does not owe any fiduciary duty to another, lays a statement before counsel for his advice professionally, he may be compelled afterwards to disclose it, if there was at the time neither suit nor dispute existing. Certainly the demurrer in *Richards* v. *Jackson* was overruled; though the order was not, I believe, drawn up. The cause, as I am informed, was, after exceptions taken to the answer, settled by arrangement. The pleadings, I think, are now dedosited in the Tower; but the

(1) 2 Atk. 214.

brief held by Sir Samuel Romilly, the defendant's leading counsel, has been lent me by the solicitors who instructed him; and it appears to state the bill and the demurrer and answer with sufficient fulness. The demurrer was in these terms:—"The defendants, by protestation, not confessing or acknowledging all or any of the matters in the plaintiff's said bill, the discovery of which is hereafter demurred to, to be true, in such sort, manner, and form as the same are thereby set forth and alleged, as to such part and so much of the said bill as asks the defendants to discover and set forth whether there are not now, and lately and when last were not in the possession or power of the defendants, or either and which of them, the case or cases in the bill mentioned, which such bill alleged was or were laid before counsel in respect of the matters therein mentioned, and the opinions thereon, or drafts or copies thereof, and which requires the defendants to set forth a list thereof, and to produce and leave the same in the hands of their clerk in court in this cause, for the usual purposes; and if the same are not in the possession or power of the defendants, or either of them, that the defendants may set forth what is become thereof, and in whose possession or power the same are, or lately, and when last were, the defendants do demur in law, and for cause of demurrer shew, that the plaintiff hath not, in and by his said bill, made such a case as doth or ought to entitle him to any such discovery as aforesaid from or against the defendants, or either of them; and humbly demand the judgment of this Court whether they ought to be compelled to make any further or other answer than as aforesaid to such part of the said bill as they have so demurred unto." And then the answer proceeds. Now, it is perhaps remarkable that the bill contains the following passages not covered by the demurrer:—"And the said William Massey caused some case or cases to be prepared and laid before some counsel for his or their opinion as to his proceedings against the plaintiff touching the said accounts, in which he stated the several matters which had taken place between him and the plaintiff, and the dealings and transactions between them, and the manner in which the said co-partnership business had been conducted, and the pretended errors in such accounts, or many of such matters. And the said William Massey was advised that he could not impeach the said settled accounts, and he, therefore, never attempted so to do: but the said William Massey being now dead, whereby the plaintiff is unable to obtain from him a full discovery of the said pretended errors, the said Roger Jackson and Philip Humberstone have filed such bill against the plaintiff as aforesaid, and have replied to the answers of the plaintiff, and are proceeding to the hearing of the said cause; and there are or lately were in the possession or power of the said Roger Jackson and Philip Humberstone, or one of them, the books of accounts of the said co-partnership between the plaintiff and the said William Massey, and various other books, accounts, books of account, letters, copies of letters, papers, and writings relating to the dealings and transactions between the plaintiff and the said William Massey, and to the other matters aforesaid, and particularly to the examination which was made by or under the direction of the said William Massey, of the accounts of the said co-partnership, about or after the said months of June or July 1794, and the supposed errors, which were above pointed out, and lists or accounts of such errors which were then made out, or drafts or copies thereof, and the case or cases which was or were laid before counsel in respect thereof, and the opinions thereon, or drafts or copies thereof; but the said defendants refuse to produce the same, or to set forth what has become thereof; and they have lately burned or destroyed many of them; and they know who were the persons who were employed by the said William Massey to examine the said accounts, and who can testify many things relating thereto, but they refuse to set forth their names and places of abode." And then the bill contains these questions:—"Whether the said William Massey did not cause some and what cases to be prepared and laid before some and what counsel for his or their opinion, as to his proceedings against the plaintiff touching the said accounts, in which he stated the several matters which had taken place between him and the said plaintiff, and the dealings and transactions between them, and the manner in which the said co-partnership

the advocate was, I believe, generally not allowed to be a witness for the client. "Ne patroni in causâ cui patrocinium præstiterunt testimonium dicant," says the *Digest*. Voet puts the communications between a client and an advocate on the footing of those between a penitent and his priest. He says, "Non etiam advocatus aut procurator in eâ causâ, cui patrocinium præstitit aut procurationem, idoneus testis est, sive pro cliente sive contra eum producatur; saltem non ad id, ut pandere cogeretur ea, quæ non aliunde quam ex revelatione clientis comperta habet, eo modo, quo et sacerdoti revelare ea, quæ ex auriculari didicit confessione, nefas est" (5). Now, whether laying or not laying much stress upon the observations made by the late Lord Chief Baron, in *Knight* v. *Lord Waterford* (6),—observations, I need not say, well worthy of attention,—I confess myself at a loss to perceive any substantial difference in point of reason or principle or convenience between the liability of the client and that of his counsel or solicitor, to disclose the client's communications made in confidence professionally to either. True, the client is or may be compellable to disclose all that, before he consulted the counsel or solicitor, he knew, believed, had seen, or heard; but the question is not, I apprehend, one as to the greater or less probability of more or less damage. The question is, I suppose, one of principle,—one that ought to be decided according to certain rules of jurisprudence.

Nor is the exemption of the solicitor or counsel from compulsory discovery confined to advice given or opinion stated. It extends to facts communicated by the client. Lord Eldon has said, "The case might easily be put, that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connexion with the case, and yet the whole title of his former client might depend on it. Though Sir John Strange's opinion was, that an attorney might, if he pleased, give evidence of his client's secrets, I take it to be clear, that no Court would permit him to give such evidence; or would have any difficulty, if a solicitor, voluntarily changing his situation, was in his new character proceeding to communicate a material fact. A short way of preventing him would be by striking him off the roll" (7). But, as to damage, a man having laid a case before counsel may die, leaving all the rest of mankind ignorant of a blot on his title stated in the case, and not discoverable by any other means. The whole fortunes of his family may turn on the question whether the case shall be discovered—may be subverted by its discovery. Again, the client is certainly exempted from liability to discover communications between himself and his counsel or solicitor, after litigation commenced or threatened, after the commencement of a dispute ending in litigation. Upon this, I need scarcely refer to a class of authorities, to which *Hughes* v. *Biddulph*, *Nias* v. *the Northern and Eastern Railway Company*, (before the present Lord Chancellor in his former Chancellorship), and *Holmes* v. *Baddeley* (8), decided lately by Lord Lyndhurst, belong. But what, for the purpose of a discovery, is the distinction, in point of reason, or principle, or justice, or convenience, between such communications and those which differ from them only in this, that they precede instead of follow the actual arising, not of a cause for a dispute, but of a dispute, I have never been able to perceive. A man is a possessor of an estate as owner: he is not under any fiduciary obligation: he finds a flaw, or a supposed flaw, in his title, which it is not, in point of law or equity, his duty to disclose to any person: he believes that the flaw, or supposed defect, is not known to the only person who, if it is a defect, is entitled to take advantage of it; but that this person may probably or possibly soon hear of it, and then institute a suit or make a claim. Under this apprehension he consults a solicitor, and, through his solicitor, lays a case before counsel on the subject, and receives his opinion. Some time afterwards, the apprehended adversary becomes an actual adversary, for, coming to the knowledge of the defect or supposed flaw in the title, he makes a claim, and after a preliminary correspondence commences a

(5) Lib. 22, tit. 5. s. 6.
(6) 2 You. & Coll. 40, 41.
(7) Lord Cholmondeley v. Clinton, 19 Ves. 267.
(8) 1 Phill. 476; s. c. 14 Law J. Rep. (N.S.) Chanc. 113.

suit in equity to enforce it. But between the commencement of the correspondence and the actual institution of the suit, the man in possession again consults a solicitor, and, through him, again lays a case before counsel. According to the respondent's argument before me on this occasion, the defendant, in the instance that I have supposed, is as clearly bound to disclose the first consultation and the first case, as he is clearly exempted from discovering the second consultation and the second case. I have, I repeat, yet to learn that such a distinction has any foundation in reason or convenience.

The discovery, vindication, and establishment of truth are main purposes certainly of the existence of courts of justice. Still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be creditably pursued unfairly, or gained by unfair means, not every channel is or ought to be open. Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much; and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself. However, I need not say, that, if any rule has been established by a decision of the House of Lords, or by a series of decisions in the Court of Chancery, that rule I have not the least intention or notion of contravening or infringing.

Upon the present occasion, my view of the right course to be taken is to direct in effect, not that any of the interrogatories should not be answered at all, but that some of them should not be answered now. The dispute here is not with a witness; and being with a party, it is not upon the validity or invalidity of a plea or demurrer, or upon the sufficiency or insufficiency of an answer or examination, or upon a question, in the ordinary form, whether a defendant shall be ordered to produce a document in his possession or power. The contest is in the Master's office, between a vendor and purchaser; and it must be borne in mind that the discovery sought, being of matters anterior to the contract, concerns the question of title only; and that, in order to obtain the production upon oath by the vendor (the exceptant) of such documents as he ought to produce, it may well be that not a single interrogatory may be necessary. And my opinion is, that, as to some portions at least of the interrogatories before me, it is only upon a special case, if at all, that, as between parties standing in the relative positions, and in the circumstances in which the parties here stand, they ought to be allowed. But I am not aware of any such special case having yet been made. In an early era of my professional life, I had to support, before Mr. Harvey, a Master of great knowledge and experience, a set of interrogatories for the examination in his office of a party (not a witness), which were relevant certainly, but not special. Mr. Harvey decided not to approve of them in that stage at least, because, though they were relevant, and might thereafter appear proper on a special case being made, a special case had not then been made for their reception. I urged, that, in a bill raising the issues which were before him (a bill not supported by oath,) there might properly be contained statements upon which there might correctly be founded interrogatories in the bill, to the same effect as those before him; and that they must be answered. Mr. Harvey agreed to that, but said, that, whether theoretically the analogy was perfect or imperfect, it was not recognized by the practice of the Master's office; and he cut the interrogatories down to a very simple and meagre form. I thought this at the time sufficiently rigid, but it was, I believe, submitted to. It may be suggested, that, if this is a right rule, I ought to allow all the exceptions. I am not quite sure that this is not so. But error so far, if any, will, I think, be harmless, certainly; and I am content to bear my valued friend, Mr. Lynch, company for a certain distance,—not forgetting, when I part from him, that he is a person whose judgment of the right way is as likely to be correct as mine.

I consider the right order will be to pass over this first exception, to overrule the third and fourth, and to allow the rest; but to allow them expressly without prejudice

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The bill stated that an act of parliament was passed on the 30th of April 1793, in the 33rd year of Geo. 3. for making a canal from the Oxford Canal Navigation at Braunston, in Northamptonshire, to join the River Thames near Brentford, in Middlesex; and it was thereby enacted that certain persons therein mentioned should be, and they were thereby united into a company for making and maintaining the said canal, and should for that purpose be a body corporate, by the name and style of "The Company of Proprietors of the Grand Junction Canal;" and the said company were empowered to purchase lands to them and their successors and assigns, for the use of the said navigation, and to make and complete a canal, to be called "The Grand Junction Canal," from and out of the Oxford canal, unto and through the several parishes and places therein mentioned, and, amongst others, through the parish of Rickmansworth, in Hertfordshire; and it was, by the 9th section of the said act, enacted, that it should be lawful for the said several corporations and persons therein mentioned, on behalf of themselves and others, and for every other person or persons whomsoever, who was, were, or should be seised or possessed of, or interested in any lands, grounds, and hereditaments, which should be set out and ascertained for the purpose of the said canal, to contract for, sell, or convey the same and every part thereof unto the said company of proprietors, and that all such contracts, agreements, sales, conveyances, and assurances, should be valid and effectual in law to all intents and purposes whatsoever; any law, statute, usage, or custom to the contrary thereof notwithstanding; and that such of them as should be made of any lands or other hereditaments to the said company of proprietors, should be made according to a form in the said act set forth. The bill further stated, that certain other acts of parliament were afterwards passed for enabling the plaintiffs to complete the canal and collateral cuts; and in one of the said acts, passed in the 41 Geo. 3, it was enacted, that if any contract concerning any lands thereafter to be purchased should be made or entered into of any such lands which should be copyhold, or of the nature of copyhold, the same should be executed and completed by surrender thereof, in the court of the manor of which the same was or were holden, according to the custom of the said manor, and such lands should continue subject to the same fines, rents, and services as were due and payable in the same manor, unless the lord or lady of the manor for the time being should be willing to enfranchise the same, in which case such lord or lady were empowered so to do; but that, inasmuch as the vesting and continuing of such copyhold premises in the said company, as a body corporate, would prevent such lord or lady from receiving such benefits of fines and other services due upon death, descent, or alienation, as if the property had continued to be the property of persons in their natural capacities, he, she, or they should be entitled to and should be paid by the said company a reasonable recompence and satisfaction for the loss that would arise to him, her, or them in respect of such fines and other services, the enjoyment of which would be diminished or lost by the vesting or continuing of such copyhold premises in a body corporate, which recompence or satisfaction, if not settled by agreement between the parties, should be ascertained and settled by arbitration in manner therein directed.

The bill then stated that Joseph Skidmore, of Rickmansworth, since de-

ceased, was seised of or entitled to him and his heirs, at the will of the lord and according to the custom of the manor of Rickmansworth, of divers copyhold lands, held of the said manor, and amongst others of or to several fields situate in the line of the said canal, and were duly described in the maps or plans in the first of the said acts mentioned, and which were required to be taken for making the said canal; and that the plaintiffs, previously to the 13th of March 1797, contracted with the said J. Skidmore for the purchase of the said pieces of land, and that thereupon the said J. Skidmore conveyed and assured the said several pieces of land in manner and form prescribed by the said first-mentioned act, that is to say, by a deed-poll, executed on the 13th of March 1797, whereby the said J. Skidmore granted and released to the plaintiffs the said pieces of land, to hold to the plaintiffs for ever, by virtue and according to the true intent and meaning of the said act. That the said J. Skidmore, at the time of the execution of the said deed, also executed a bond to the plaintiffs for indemnifying them against the payment of all quit-rents, heriots, customs, and services which should thereafter be claimed or demanded by the lord of the said manor, in respect of the said premises. That at the time of the execution of the said deed-poll of the 13th of March 1797, Henry Fothergill Whitfield, Esq. was seised in fee of the manor of Rickmansworth; that he died in the year 1813, having, by his will, devised the said manor to trustees upon trust for sale; and that, some time after the death of the said H. F. Whitfield, and in the month of June 1818, the said trustees sold and conveyed the said manor to Robert Williams, Esq., who afterwards conveyed the same to William Windall, Esq., who subsequently, and in or about 1831, sold and conveyed the manor to the defendant William Dimes, and the said manor had ever since been vested in him. That the said J. Skidmore died, leaving the defendant Thomas E. Skidmore his heir, according to the custom of the said manor of Rickmansworth; and that Edmund Lucas, the trustee named in his will, accepted the trusts of the said will. That at a court holden for the said manor, after the death of J. Skidmore, the said E. Lucas was admitted to all the lands and hereditaments holden of the said manor, whereof J. Skidmore died seised, and which were devised to the said E. Lucas, to hold unto the said E. Lucas, his heirs and assigns for ever, upon trusts declared by the will of the said J. Skidmore, but that such part of the lands as then formed part of the said canal were expressly excepted in such admittance, and the said premises to which the said E. Lucas was admitted, did not comprise any part of the premises of the said deed-poll conveyed or assured as aforesaid. That by the custom of the said manor of Rickmansworth, the lord of the said manor, upon every descent of copyhold premises holden of the manor, was entitled for his fine to two years' improved value of such premises; and upon the death of a copyhold tenant, if no person should appear to be admitted to the premises whereof such copyhold tenant died seised, the lord of the manor was entitled, after certain proclamations had been made, to seize such copyhold tenements, and take the rents and profits thereof; and that no person having, upon the death of the said J. Skidmore, claimed to be admitted to the said copyhold premises, the said defendant, W. Dimes, claiming to be lord of the said manor, caused proclamations to be made in the proper form, and issued a warrant for seizing the same into his own hands as lord of the said manor. That the said defendant, W. Dimes, commenced an action of ejectment against the plaintiffs, for recovering possession of the said copyhold premises, which was finally decided in favour of the said W. Dimes, who thereupon sued out a writ of possession, and thereby recovered possession of the said premises, and caused a moveable bar to be placed across the canal, and gave notice to the plaintiffs that unless they paid the sum of 5,000*l.* before a certain day he would wholly stop the navigation of the said canal, and the said W. Dimes had since caused a large quantity of bricks to be thrown into the canal, for the purpose of stopping the navigation thereof. That, though the lord of the said manor might be legally entitled to recover the said copyhold premises as aforesaid, the plaintiffs were, nevertheless, entitled themselves to be admitted, or to have the defendant, T. E. Skidmore, or such other

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entered up against W. Cox in the action, must be considered tantamount to a verdict obtained against the three defendants to the action; that no special circumstances were disclosed on the part of the petitioners, as occurring subsequently to the commencement of the action at law, to justify the present application; and that the non-junction of W. Cox in the application to the Court was an insuperable objection, as a bill of costs under the late act of parliament 6 & 7 Vict. c. 73. could only be ordered to be taxed at the request of the parties chargeable therewith, and there was no inherent jurisdiction in the Court to make the order independently of that act.

The following cases were cited in opposition to the petition:—

In re Whicher, 13 Mee. & Wels. 549; s. c. 14 Law J. Rep. (N.S.) Exch. 78.
Hobby v. *Pritchard*, 2 Mee. & Wels. 124; s. c. 6 Law J. Rep. (N.S.) Exch. 24.
Margerum v. *Sandiford*, 3 Bro. C.C. 233.
Hazard v. *Lane*, 3 Mer. 285.
Lockhart v. *Hardy*, 4 Beav. 224.
In re Chilcote, 1 Ibid. 421.
Massie v. *Drake*, 4 Ibid. 433.

Mr. Kindersley, in reply.

[The MASTER OF THE ROLLS.—The only point is this, there is a verdict obtained against one of the three parties sought to be charged with the bill of costs, and a question is raised about the retainer. In some cases the taxation of the bill of costs objected to has been secured, but the Court has not deprived the party of the opportunity of trying the question of retainer or no retainer; and, in one case, I suspended the taxation until after the action brought for the recovery of the amount of the bill of costs had been tried.]

Mr. Kindersley.—A retainer is either in writing, or it is to be inferred from various dealings and transactions. No written retainer is pretended by Hare to have been given in this case; and he does not allege a single fact which tends to shew there was a retainer by the three brothers in respect of the business objected to by the petitioners. Whatever the result of the action at law may be, there must be a taxation of the bi the Master always takes into consid the question of retainer. In the cas *re Chilcote*, relied on by the other si was the only responsible party to p bill; and, in the present case, Ha placed W. Cox in such a situation t cannot and dare not come forward hc against the respondent.

The MASTER OF THE ROLLS, after the facts, proceeded as follows:— the Master there will be due inquiry touching the retainer. In the action brought by Hare against the peti and W. Cox, for the whole amount bill of costs, Hare himself (being the tiff) appeared for the defendant W and on that appearance proceeded action, and entered up judgment a W. Cox, and then the present peti presented by John and Joseph Cox; is objected by the respondent that th tion ought not to be granted because t a judgment entered up in the action a W. Cox, which, it is contended, ou be looked upon as a verdict agai three, but that could not be conceded other objection raised is, that the peti presented by two out of three perso are all chargeable with the bill of cost the petition of the two who offer to pa is due from them; and does Hare m say he desires to have something not and legally due to him? It is not th tion of all three, only because there nifestly collusion existing between parties, or, at least, oppression ex by one of those parties. The circums of the case are special enough, and th citor ought not to escape having h taxed by the means that have bee resorted to. The courts of law d allow taxation of bills of costs after obtained; but this Court, notwithst an action has been commenced, will taxation. The taxation of a bill of before a jury at common law, by me the evidence of witnesses, is ridiculou the obtaining a judgment against several parties, under circumstance the present, is not the proper course pursued by a solicitor; but what wa ought to be done between the parties. ment must be confessed in the action

which is pointed out, to convey all his right, title, and interest therein.

Now, Mr. Skidmore was a copyholder in fee in the ordinary sense, and the corporation took from him, for valuable consideration, a conveyance in the very terms of the act; and the act of parliament, in the 4th section, declares "that it shall be lawful for any persons (describing them) who may be seised, possessed of, or interested in any lands, tenements, or hereditaments, to contract for, sell, or convey the same and every part thereof unto the said company of proprietors, and all such contracts, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law, statute, usage, or custom to the contrary thereof in anywise notwithstanding." And then the form is given, which form itself expresses that the party who uses it conveys;—the expression is, "grant and release to the company all his right, title, and interest." It appears to me that the act of parliament in this 4th section was providing for the conveyance by a party who had an interest, of that interest, and nothing more than his interest, and did not mean that, where a party by the stipulated form conveyed his interest, he should be taken to convey anything which trespassed upon the rights of others, or would tend to derogate in any degree from the right of others; but merely enabled him by a given form to convey his rights. Then the case is, that Mr. Skidmore, being a copyholder in fee, does, for valuable consideration, use this form of conveyance. Then what was the character which, according to the plain construction of the act of parliament, he sustained? Before he executed the conveyance, he was a copyholder in fee, who had a right, as against the lord, to have his copyhold fee of inheritance continued to him on admission from time to time of the heir of the party who was tenant upon the roll. I cannot conceive that the act of parliament could be so construed as to give this effect to the conveyance, that it should pass to the company at once the absolute right of the copyholder in the same sense as if he had surrendered to the corporation, and the lord had admitted the corporation. That I cannot conceive, because that would necessarily have had the effect of making the use by the tenant of the prescribed form of conveyance pass something which did not belong to him, namely, part of the right of the lord. Therefore I must take it that the proper mode of construing the act is this—that by that form of conveyance Skidmore passed all his interest in the land, subject only to this, that, for the purpose of continuing the inheritable interest in the land upon his death, by way of example, for I need not go into all the cases, upon his death that he retained the right,—because it did not pass from him on account of the lord's interest,—that he retained the right to be admitted by his heir for the purpose of continuing the copyhold inheritance to his grantee for valuable consideration; and therefore I do not think that he altogether ceased to be a copyholder, but remained a copyholder, he being a trustee of the remaining right which he had as a copyholder, for the purpose of giving full effect to that form of conveyance, which, in the way it was constructed, could not pass the whole absolute interest of the copyholder in the same way as if he had surrendered and the surrenderee had been admitted, but which did everything short of that. Then the lord himself admits by his proceeding that there was a copyhold tenant upon the roll, and upon the death of that copyhold tenant that he himself is entitled to seize *quousque*,—that is his case, and that case he has established at law. Then if he has a right to seize *quousque*, there is a corresponding right in the heir of the tenant on the court roll to say to the lord, "Now, I will be admitted upon payment of the proper fine;" and my opinion is, that the heir of the copyhold tenant has that right, and has it merely as a trustee for the corporation, and that the proper thing to be done in this case is to give effect to the whole transaction as far as you can, without violating the rights of any one. Therefore, it appears to me that it would be an extremely improper thing to direct that the corporation shall be admitted against the will of the lord; but my opinion is that the corporation has a right as against the will of the lord to say, "You, the lord, shall admit that person who *de facto* is the copyhold heir of the tenant upon the roll," who was Mr. Skidmore.

It may be true that Mr. Skidmore was not the tenant who died seised, but though it is not true that he died seised as against

that he delivered the annuity deed to Colombine, for the purpose of enabling him to recover the arrears of the annuity, and that he never authorized Colombine to enter into an arrangement with the plaintiff for release of the annuity, was a sufficient answer to the plaintiff's motion; that Colombine was not trusted with the general custody of the defendant's deeds, and the plaintiff's solicitor must have been well aware of the necessity of an actual release by deed of the annuity to render the arrangement a valid one, and yet never intimated the fact of the arrangement having been entered into, or made any application to the defendant with relation thereto; and that it was not likely that Swindall would know that the annuity deed was required for the purpose of entering up judgment on the warrant of attorney.

The Master of the Rolls.—The plaintiff, Mr. Teesdale, and the defendant, Mr. Swindall, unfortunately for themselves, engaged in a transaction of a kind which generally proves to be extremely unsatisfactory to all those who are concerned in it. Mr. Swindall, it seems, is in the habit of laying out his money in the purchase of annuities, and employed Mr. Colombine as an agent of his for that purpose to some considerable extent.

In the year 1842 the plaintiff borrowed the sum of 1,650*l.*, of which 700*l.* seems to have belonged to Mr. Swindall, and the remainder belonged to other defendants in the cause, and for which one annuity of 236*l.*, divided into four parts, was granted to Swindall. The plaintiff seems to have been so far unable to make the payments which accrued due in respect of this annuity that upon every occasion he was under the necessity of raising money by acceptances or bills of exchange, which were drawn on him by Mr. Colombine, who had been the agent acting for both parties in the grant of the annuity, on terms (which ought to be designated as a warning to all those who engage in these transactions) as it has been stated to me to-day, of the payment of interest sometimes at the rate of 120*l.* per cent. Those are the ruinous conditions upon which gentlemen in the situation of this plaintiff raise money on such occasions as this; the security, moreover, attended with this vision, viz., that if there was an arr payment for a short time, this gentl would be bound to apply for leave t his commission in the army for the pose of raising money for the payme the annuity—that is, to abandon his tion in society. In the year 1845, a the month of June in that year, in sequence of some application made friend of the plaintiff, Mr. Colo proposed terms of arrangement or co mise, an arrangement or compromise w by the demands on him, which, with o amounted in the whole to 14,276*l.*, a be settled by the payment of 9,850*l.* terms of that compromise were not i diately agreed to, the consequence of was, that the same agent who was for both in the month of July, issued rants in five several actions, and ar this gentleman. The consequence o was, that on the 23rd of July the ter the compromise were agreed upon; was arranged that this sum of 9,850*l.* s be paid to Mr. Colombine, for the pe who were entitled to this money, whic intended thus to be secured; and o payment of that sum of money re were to be executed. Some time w be given for the arrangement of that action. Mr. Roper was at that tim solicitor employed for the plaintiff; a the 24th of September he seems to been ready to do that which was re on the part of the plaintiff: but a time Mr. Colombine had not pos himself of all the securities which we that occasion to be delivered up. Ther in consequence, a new arrangement for some temporary delay, and on th of October the parties met to complet transaction. The rest of the mone then paid, and the remainder of the rities delivered up;—securities, in this they were called, securities consisti the deed dated in February 1842, an memorandum of the judgment whic been entered up.

Now, there are two things in this which I think must create some surprise persons who are in the habit of seeing business is transacted, viz., that the n should be paid without the releases executed, without provision being ma

the immediate entrance up of satisfaction on the judgment. It is very true that in ordinary transactions between persons who are engaged in fair dealings, there is a confidence between them, that that which is agreed to be done to-day, will be done to-morrow, if it was agreed to be done to-day. But I am astonished to hear that these sort of annuity transactions are to be considered as resting on any such foundation of confidence. It is not according to the experience that I have had that that should be done; and I believe that the parties are imprudent if they do not take care that, before the money is paid, the thing required to be done is done. Another thing that surprises me very much in the statement of this case is, that the defendant, who says that he was acquainted with this transaction in the month of October 1845, should have rested quietly upon it: gives no notice that he did not consider himself bound by the transaction that had taken place: goes on, and in the following month of May 1846, when he changes his solicitor, he makes a demand of the annuity as if not a farthing had been paid on account of it. That, however, happened; the money was paid which entitled the plaintiff to his releases, provided the defendant was bound by the transaction which then took place. The defendant found himself without the securities on which he relied, and yet he gave no notice to the parties against whom his claim was to be maintained. It has been argued here to-day that there could be no general confidence in relation to this matter between the defendant Mr. Swindall and Mr. Colombine. Why? Because Mr. Swindall took possession of these documents at the time when the deed was executed and kept them in his own possession. He kept them in his own possession for his security, and to prevent Mr. Colombine having a power over them. How is it that he happened to give up those deeds into the possession of Mr. Colombine just about this very time? Whether it was in July or just before October when they were given up, I do not know; nor does it appear to be so material as it has been contended to be. This is said, viz. that having carefully kept those instruments in his own possession, he delivered them out just at the moment when Mr. Colombine was engaged in making this compromise. It is said, he did this for the purpose of an action which he was bringing, and so on. I must say, that I cannot attach much weight to that statement; the two things stand very ill together—viz. that he kept the instruments, in order that they might be under his own dominion and power, and then gave them up when it was not necessary for the purpose. However, the matter proceeds, and the parties remain quiescent till the month of May 1846; and in that month, a letter is written very coolly by the gentleman who was then employed by the principal, knowing what had happened, giving no notice of it, containing a simple demand for payment of the arrears of the annuity; the gentleman who wrote this letter being the solicitor of the defendant, who knew perfectly well, that upon a supposed compromise, at least, the deed and security had been given up on the notion entertained by the plaintiff, that he had compromised the claim of Mr. Colombine. This letter, I presume, was known to Mr. Colombine. From what we find stated of him, I believe he is no party to this motion, and, therefore, I need not say anything more than is absolutely required. What does he do? He writes the letter of the 27th,—he says, "I hear you are in a most miserable situation; you must sell your commission; you must leave your position in society; you had better have a subscription raised amongst your friends to support you." No doubt he was desirous, at least, that the plaintiff should submit to the power that was intended to be exercised over him, and which must have been intended to be exercised over him by the introduction of such a clause as that into the original grant.

The consequence of all that was the present suit, which was instituted immediately afterwards; and in it I am inclined to think the principal point is this—had Mr. Colombine authority from the defendant to enter into this arrangement for a compromise? We are here on the answer: Mr. Swindall positively and directly denies that. There is another ground, here, made of interference—viz. that it was a wilful fraud practised on the plaintiff, for the purpose of extorting money from him: that is also most positively denied. There can be no doubt that, according to the practice of this Court, unless there be other circum-

stances in the case, which create more or less of suspicion, the defendant who so swears will for the time defend himself against the injunction, whatever may come of the matter afterwards—he will defend himself for the time. But it is equally clear, that notwithstanding the denial contained in the answer,—and if there be circumstances appearing by the answer, affording ground of belief, that when the matter comes on to be formally tried on evidence, the defendant will not have all the benefit of that denial which he has given in his answer,—it will be taken into consideration by the Court what other circumstances there are affording a probability that the allegations which are made in the answer may not ultimately be sustained; and the Court may either think it right to order the money into court or to abstain from so doing.

Now, in considering the circumstances of this case, I cannot persuade myself that there are not some grounds to believe that there was an authority here: it is directly contrary to the oath of the defendant; but it is attended with circumstances which induce me to think, that that is a case which should be made out. While I say that, I cannot say that it is so clear from these inferences, which are to be made against the answer, that the Court ought not to protect the defendant from the consequence of losing his money, if it should turn out that he is ultimately right; and, therefore, what I think it right to do is this: I think that this injunction should be continued on the terms of the defendant paying into court those sums of money which may from time to time become due, on the supposition that the annuity may effectually be established. A question arises about that, because Mr. Kindersley asked, whether that ought to be in respect of the demand of Swindall alone, or in respect of the whole. I think the Court might deal with that probably in a more satisfactory manner, if we had the other defendants here at the time; and, further, I think, that this is a matter which would be far better investigated at law than it can be here; and I should be disposed to give leave to the plaintiff, notwithstanding the pendency of this suit, to proceed at law with an action, in which it could be proved whether or not there was authority; thinking, however, that he ought, as he has offered, to be b by the verdict which may be obtaine that action: and I believe I could not ceed in a manner more likely to bring litigation to a speedy conclusion than will turn out to be.

M.R. Jan. 27. } EDGE *v.* DUKE.

Orders of Court of 1845—*Amendmen Bill—Irregularity.*

After an order of the Vice Chancello amend the bill on payment of costs, made a special application for leave to am without prejudice to the common injunct which was not acted upon, the plaintiff tained an order to amend, as of course, petition at the Rolls:—Held, that the order was irregular.

Mr. Bigg, for the defendant, move discharge an order to amend that had b obtained by the plaintiffs, with costs; that the amendments might be ordere be taken off the file.

The last answer was filed on the 7t October 1846, and on the 23rd of Noven following the Vice Chancellor of Eng made an order, giving the plaintiffs leav amend as they should be advised; but order was not acted on, nor did the affid filed in support of the notice state th had been drawn up. On the 8th of Jan 1847, the plaintiffs obtained an order of course, on petition in this court, to am their bill.

The 65th and 66th Orders of the 8t May 1845 (1) were referred to, and *Br* v. *Purton* (2) was cited in support of motion; and it was contended that order to amend made by the Vice Ch cellor of England, though not acted u was within the meaning of the orders of Court and its practice: the applicatio the Vice Chancellor of England was leave to amend, without prejudice to common injunction that had been grant and the Vice Chancellor ordered the pl tiffs to pay the costs of the application,

(1) Ord. Can. 308; 14 Law J. Rep. (Chanc. 290.

(2) 4 Beav. 494; s.c. 11 Law J. Rep. (Chanc. 73.

cause the order was an order of course; and if the last order to amend had not been made, the defendant would have been in a situation to move to dismiss the bill for want of prosecution.

Mr. Turner, for the plaintiffs.—On the 23rd of November two motions were before the Vice Chancellor of England, one being to dissolve the common injunction, and the other to amend without prejudice to the injunction. The injunction was dissolved, and an order was at the same time made, giving leave to the plaintiffs to amend their bill generally. Upon that the plaintiffs appealed to the Lord Chancellor, who agreed in the propriety of the Vice Chancellor's decision. The plaintiffs could not act in time on the order of the Vice Chancellor to amend, which was made *diverso intuitu*. This branch of the Court has no jurisdiction to order the amended bill to be taken off the file; even if the application was granted discharging the order which gave leave to amend, still a motion must be immediately made to the Vice Chancellor of England to take the amended bill off the file; and at all events, as the defendant came to the court after the expiration of the time within which the plaintiffs could amend the bill, no costs ought to be given to the defendant.

The Master of the Rolls.—A motion to amend, without prejudice to an injunction, is properly a special motion, and the Master has no authority to make an order upon it. The Vice Chancellor of England thought, when the application was made to him, that, as a special motion, it ought not to be granted, but an order might be granted as of course; and the plaintiffs being desirous to bring the matter before the Lord Chancellor, do not act on the order made by the Vice Chancellor. The plaintiffs' object failed before the Lord Chancellor; and after such proceedings had been had, an order of course ought not to have been obtained by the plaintiffs. The motion seeks to have the amendments taken off the file: this I have not power to grant; but I discharge the order giving leave to amend, with costs.

K. Bruce, V.C. Jan. 25. } WILSON *v.* PILKINGTON.

Settlement—Construction—Trust.

A, by a settlement, declared that trustees should be possessed of 4,000*l.*, *as to a moiety for M. and her children; and, as to the other moiety, for N. and her children; and that if both M. and N. should die without leaving issue living at the time or respective times of their decease,* then *that the trustees should divide the trust monies among the personal representatives of A. in a legal course of administration. M. and N. both died without having been married. A. did not leave a widow:—Held, that the persons intended to be benefited were the next-of-kin of A. living at his death.*

By an indenture, dated the 29th of September 1831, Ellis Duckworth declared that the trustees therein named should stand possessed of 4,000*l.*, upon trust as to a moiety for his daughter Anne Jane Duckworth and her children; and, as to the other moiety, for his other daughter, Harriet Duckworth and her children; and it was declared that, in case either of them should die without children, the trustees should stand possessed of the moiety of the one so dying for the benefit of the other of them and her children. The settlement then contained the following passage:—"And in case both of them, Anne Jane Duckworth and Harriet Duckworth, shall happen to depart this life, and shall not leave any issue of either of their bodies living at the time or respective times of their decease, *then* upon further trust, that they, the said trustees, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, shall pay, apply and dispose of the said principal trust monies, and the dividends, interest and proceeds thereof, or such part of such dividends, interest and proceeds as shall not have been applied for the purposes aforesaid, unto and amongst *the personal representatives of the said Ellis Duckworth in a legal course of administration.*"

Anne Jane Duckworth died in 1834, without ever having been married. Ellis Duckworth died on the 8th of January 1839. Harriet Duckworth died in October 1844, without ever having been married.

Ellis Duckworth did not leave a widow; and his sole next-of-kin at his death were Harriet Duckworth and the defendant, Mrs. Wilson.

At the time of the filing of the bill, the defendant Jane Shelmerdine was the sole executrix of Harriet Duckworth, and Mrs. Wilson was, as administratrix of Ellis Duckworth, with his will annexed, the sole personal representative of Ellis Duckworth.

The bill was filed by the trustees of the fund, for the purpose of ascertaining to whom it belonged.

Mr. Wigram and *Mr. Roundell Palmer*, for the plaintiffs.

Mr. Bacon and *Mr. Prior*, for Mrs. Wilson, said that Mrs. Wilson's claim to the whole of the fund might be put in three different ways: first, that she, as filling the character of personal representative of Ellis Duckworth, at the time of the distribution of the fund, was beneficially entitled to it. This claim, however, they waived. Secondly, that she, as filling such character of personal representative, was entitled to it, not beneficially, but as part of the assets of Ellis Duckworth. This they insisted on. But, thirdly, if it should be held that consanguinity, and not representation, was meant by the words "personal representatives," then she, as the sole next-of-kin of Ellis Duckworth, at the time of the distribution of the fund, was entitled to it. They cited

Jones v. *Colbeck*, 8 Ves. 38.
Booth v. *Vicars*, 1 Coll. 6; s. c. 13 Law J. Rep. (N.S.) Chanc. 147.
Minter v. *Wraith*, 13 Sim. 52.

Mr. Russell, for Jane Shelmerdine, was not called upon.

K. BRUCE, V.C.—I think that the word "then," occurring where it does and as it does in the instrument, is of little or no weight in favour of Mrs. Wilson. I think, also, that the expression "personal representatives," occurring where it does and as it does in the instrument, means consanguinity. I also think that the terms of this instrument render it necessary for me to decide that the persons intended to be benefited were the next-of-kin living at the death of Ellis Duckworth. I wish it to be particularly understood that although I mention the word "consanguinity," I do not mean to express any opinion whether the widow of Ellis Duckworth, if there had been one at his death, would have had any claim on the fund.

M.R.
1846.
Nov. 14;
Dec. 23.
1847.
Jan. 29.

In re FREDERICK HARRISON.

Costs, Taxation of — Protest — Overcharges—Mortgagor and Mortgagee.

A mere protest against a bill of costs, and the impropriety of the items contained therein at the time of payment, will not entitle the party making the payment to an order to tax the bill.

A mortgagor, seeking to tax the bill of costs of the mortgagees' solicitor relative to the mortgage transactions, will only be allowed to tax the bill in the same manner, and on the same principle, as the mortgagee would be allowed to tax it: and where the bill of costs of the mortgagees' solicitor was forwarded to the solicitor of the mortgagor upwards of a fortnight before the payment of it by the mortgagor, and payment being insisted on was made by the mortgagor's solicitor before the delivery up of deeds by the mortgagees' solicitor, the Court refused an order for taxation, notwithstanding the mortgagor's solicitor, at the time of payment of the bill, stated his general objection to the items contained in the bill, as being excessive and improper, and also made the payment under protest.

This was the petition of Edward Wickham, the legal personal representative of Thomas Parlabean (deceased), who, previously to his death, had mortgaged certain real estates to persons of the name of Moor and Mallows and Morse, praying taxation of a bill of costs of the solicitor of the mortgagees. Parlabean having been pressed for payment of interest due on the mortgage securities, and an action having been brought to reeover the same, it was arranged that the mortgaged estates should be sold, clear of the mortgage securities, and the principal and interest

monies satisfied out of the purchase-money of the estates. The sale was effected, and Harrison, the mortgagees' solicitor, after application made to him for that purpose, delivered his first bill of costs, amounting to 65*l.* 12*s.*, to the solicitor of Wickham, on the 16th of October 1846, the 5th of November 1846 being the day appointed for the parties to meet, to complete the purchase. On the latter day a further bill of costs of 8*l.* 8*s.* was delivered by the mortgagees' solicitor to the solicitor of Wickham, and, on the same day, the parties met, and the sale was completed; but the solicitor of the mortgagees having declined to deliver up the title-deeds relating to the estates, unless his bills of costs were first satisfied, the solicitor of Wickham paid the amount thereof in full, upon the understanding that the payment was made under protest; and he, at the same time, stated that several items in the bills of costs were improper and excessive, but did not point out the particular items. The petition set forth divers items in the bill of costs as excessive and improper, and which it was insisted by the petitioner's solicitor the petitioner was not bound to pay. On the other hand, it was contended that the items complained of were proper charges, as between the mortgagees and their solicitor, *i.e.* between solicitor and client, and that the allegations in the affidavits filed in support of the petition had proceeded on the supposition that the petitioner was only bound to pay such a bill of costs to the solicitor of the mortgagees as the petitioner would be bound to pay to his solicitor.

Mr. Roupell and *Mr. Elmsley*, in support of the petition, cited *In re Wells*, 14 Law J. Rep. (N.S.) Chanc. 215.

Mr. Kindersley and *Mr. Glasse*, contrà.

The MASTER OF THE ROLLS said, that in a transaction in which a bill of costs was paid, a protest of itself, by the client, without other circumstances, was of no avail at all; that an erroneous notion seemed to exist, viz. that if a solicitor insisted on being paid by his client more than he had a legal right to demand, and that client chose to satisfy the full demand, intimating, however, at the time of payment, that he should afterwards apply to the Court for an order to tax the bill, he would afterwards be allowed to tax the bill; but the Court would certainly not, on that ground alone, interfere with the payment made by the client: that the present petition proceeded on the ground that the mortgagor having settled accounts with the mortgagees, and satisfied the bill of the solicitor of the mortgagees, was entitled to tax that bill, as if it were a bill of costs between the mortgagor and the solicitor; but that was not the rule of the Court: that if in *In re Wells* his Lordship had laid down the proposition, that, in the case of a bill of costs, delivered a fortnight before the settlement took place between the parties, and ample opportunity given for the client to scrutinize the items of the bill, at the time of settlement no notice was taken thereof, the party was entitled to taxation, then the case of *In re Wells* was wrongly decided; but if it was there determined that, in the case of a bill of costs for the first time produced to the client at the time appointed for settlement of it, and a request then made to the solicitor to allow the payment to stand over for a day or two, to enable the client to look into the bill of costs, and a refusal of such request by the solicitor, then the case of *In re Wells* was properly decided; that the present case rested on the circumstance of there being certain overcharges in the bills of costs which was not sufficient to induce the Court under the act of parliament to open the same, and the petition would therefore be dismissed with costs.

M.R.
Jan. 22.
Feb. 1.

TUGWELL *v.* HOOPER AND OTHERS.

Solicitor and Client—Trustee—Privileged Communications—Production of Documents.

G. a solicitor, who was a trustee under a deed of settlement, in which M. and H. were respectively interested, ordered, on bill filed by M. against H. and G, to produce letters admitted by G.'s answer to be in his possession, and which were written by him whilst acting as H.'s solicitor, during the negotiations touching the settlement, and subsequently to the execution thereof; notwithstanding the allegation of G, that most of

the letters were written by him, and signed with the name of himself and partner in business, as the solicitor to H, and that the same were not written by him as trustee under the settlement.

This was a motion in a cross suit for the production of certain documents admitted by the defendant Goldney's answer (and the second and third parts of the schedule thereto) to be in his possession. The defendant Hooper, in the year 1840, being about to intermarry with a lady named Freame, and to settle his estates, and being indebted to Messrs. Tugwell & Meek, his solicitors, it was arranged that provision should be made in such settlement for securing payment of the debt due to Messrs. Tugwell & Meek. A deed of settlement was accordingly executed of Hooper's estates, subject to a charge thereon of the amount of the debt due to Tugwell & Meek; afterwards, Hooper filed a bill against Tugwell & Meek, Goldney and others, insisting that nothing was in reality due from him to Tugwell & Meek, and seeking to have the accounts between him and Tugwell & Meek opened and retaken; and on Tugwell & Meek's answer coming in, the documents admitted to be in their possession were ordered to be produced for the plaintiff Hooper's inspection. The present bill was filed by Tugwell & Meek on the 29th of July 1841, seeking to have the charge in favour of their debt enforced. The marriage between Hooper and Miss Freame took place on the 28th of August 1841. Messrs. Goldney & Fellowes acted on that occasion as the solicitors of the father of Miss Freame; Goldney was also one of the trustees named in the marriage settlement, and during the negotiations for the marriage (in which was involved the question of the amount due to Tugwell & Meek), Tugwell & Meek acted as the solicitors of Hooper. In April 1841, and subsequently thereto, Goldney and Fellowes, as solicitors of Hooper, communicated with Tugwell & Meek on the subject of the debt due to those gentlemen; and the parties not agreeing on the amount due, Goldney, on the 26th of July 1842, declined acting any longer as solicitor in the affairs of Hooper, and thereupon Mr. Freame, who was a solicitor, acted on Hooper's behalf, and also as the s of Goldney, one of the defendants cross bill. Goldney by affidavit that all the letters mentioned and prised in the second and third parts schedule to his answer, were either to and received by him and his Fellowes jointly, or himself only, solicitor or solicitors of Freame, and Hooper, or were written to or by h his said partner or himself after t putes in the two causes arose, an respect to the subject-matter thereo with reference to all such letters con in the second and third parts of the s to his answer, Goldney stated, that al he was a trustee of the settlement, not consider himself as writing to o sponding with, nor did he, in fact, ing to the best of his judgment and write to or correspond with Hoo Freame, or either of them, or w plaintiffs, or any other person in su racter of trustee, but in the chara solicitor to the said parties, or one o and in most of his letters he sign name of his partnership firm; an most of the letters so received by hi addressed to his firm, and not to individually.

Mr. Kindersley and *Mr. Wray*, port of the motion, contended, that the communications might be very im to the plaintiff's case, and ought to duced; that Goldney could not be to divest himself of his character of and assume that of solicitor to Ho his convenience; and that, in reality ney never acted in the negotiatio arose between the parties adversely solicitor of Hooper.

Mr. Turner and *Mr. Hardy*, contended, that as Goldney acted solicitor of Freame (who was not a the suit) in August 1841, it was so new to seek the production of cor dence, in which Freame, who wa party to the suit, was interested, an took place prior to July 1842, a time and not before, Goldney ce act professionally for Freame or that Freame then became the soli Hooper, and the letters written quently to that date had relation to

putes that had arisen between the parties, and were privileged communications. *Vent v. Pacey* (2) was cited in opposition to the motion.

The MASTER OF THE ROLLS, after stating that he must, under the circumstances, and for the purpose of the motion, assume that Goldney was, in fact, the trustee of the settlement, the other person named in the settlement as his co-trustee having duly disclaimed, observed that a person undertaking to become a trustee for two parties, could not act independently and in favour of one party against the other in matters connected with the trust affairs; that as a trustee, Goldney had a clear duty to perform towards all parties interested in the subject-matter of the trust; he could not place himself in any situation except that of strict impartiality, and communications with one of the parties interested could not be deemed confidential communications to be clandestinely carried on between the trustee and one of those parties without disclosure to the other party; that he must act according to the strict rule of the Court laid down by the authorities; that although some of the communications were with a person not having any interest in the trusts, and not a party to the suit, still the person was acquainted therewith, and was a party to the negotiation; and as regarded Hooper, he had full notice of everything that occurred, and was to be benefited under the trusts; that there was no imputation on Goldney, but still he could not, as a trustee for the two parties concerned, be allowed to place himself in a situation that would prevent his acting impartially towards both; that the order for production must apply to the written communications that took place before the marriage, as well as after that event, up to the time when Goldney ceased professionally to act; but as to the communications between Goldney and Freame, after Goldney was made a defendant to the cross suit, they must be considered to be privileged as being between solicitor and client, after the disputes between the parties had arisen.

(2) 4 Russ. 193.

K. BRUCE, V.C. Feb. 8, 25. } JOHNSON *v.* BARNES.

Process—Service of Subpœna—Costs.

On the 2nd of November 1846 *the plaintiff served the defendant with a copy of a subpœna, omitting, however, the indorsement required by the 4th Order of December* 1833. *On the 10th of December the plaintiff obtained an order for leave to enter an appearance for the defendant, and served him with a copy of it on the 30th of December. Motion by the defendant on the 8th of February* 1847 *for the discharge of the service and order granted with costs.*

The 3rd Order of the 21st of December 1833 (1) directs that the name or firm and the place of business or residence of the solicitor issuing a subpœna shall be indorsed thereon. The 4th Order directs that the service of subpœnas shall be effected by delivering a copy of the writ and the indorsement thereon, &c.

On the 2nd of November 1846 the plaintiff served the defendant with a copy of a writ of subpœna. There was not, however, on this copy any indorsement, as required by the 4th Order. The defendant did not take any notice of this delivery.

On the 10th of December the plaintiff, under the 29th Order of the 8th of May 1845 (2), and upon an affidavit that the defendant had been served with the subpœna, applied to the Court for leave to enter an appearance for the defendant, and obtained an order accordingly; and on the 30th of December served the defendant with a copy of the order.

The defendant now moved that the copy and service of the subpœna, and the order for entering an appearance, might be discharged for irregularity, in consequence of the omission of the name and residence of the solicitor on the back of the copy of the subpœna. The motion stood over from the 8th of February to the 24th of February, at the request of the plaintiff.

Mr. Lewis for the motion.

Mr. Fooks, for the plaintiff, raised a pre-

(1) Ord. Can. 43; 3 Law J. Rep. (N.S.) Chanc. 1.

(2) Ord. Can. 294; 14 Law J. Rep. (N.S.) Chanc. 287.

liminary objection, that the defendant could not be heard, as he had not entered any appearance.

KNIGHT BRUCE, V.C. thought that an appearance ought to be entered.

An appearance was at once entered with the registrar.

Mr. Fooks, for the plaintiff, then contended, that if the motion for the discharge should be granted, the defendant was not entitled to costs. It was clear the defendant had suffered no injury or inconvenience. The service was a nullity; it was as if it had never taken place. No proceedings could have been founded on it. Then what was the conduct of the defendant in this case? The service was made on the 2nd of November. The irregularity was then known to the defendant, and, if he had mentioned it to the plaintiff, it would have been set right at once, without any application to the Court. The defendant, however, took no notice of it, lay by for three months, and then brought the matter before the Court. This conduct ought to be taken into consideration in the decision as to costs.

KNIGHT BRUCE, V.C.—I am of opinion that if a defendant is served with a copy of the subpœna, with the omission of the indorsement, however ineffectual the service may be, it is the right of such defendant to come here speedily, and have it discharged, and with costs. On this point I never entertained a doubt.

The service was made in November, and application for the discharge is not made until February. An apology is required for this delay, which apology might not be sufficient to induce the Court to take the course it would otherwise consider it right to do. It appears then, that, on this service, stated to be a nullity, an order has been made and served for entering an appearance for the defendant.

It is clear that the service and order must be discharged, with costs. The conditional appearance entered to-day must go for nothing.

K. BRUCE, V.C. Feb. 24, 26. } HOLROYD *v.* WYAT

Income Tax—Purchase Money.

According to the practice a purc ought to pay his purchase-money and in thereon into court, without any ded from the interest in respect of income t

Mr. Piggott moved, that a purc might pay his purchase-money and in thereon into court, with a deduction ever from the interest, in respect of in tax. He referred to 5 & 6 Vict. c. 35. s.

KNIGHT BRUCE, V.C. said, he th the registrars ought to be consulted what the practice was.

On a subsequent day,—

Mr. Piggott said, the registrars had consulted, and that it had been ascert from them that it was not the practic such deduction should be made.

An order was then taken for the pay of the purchase-money and interest.

M.R. March 4. } SCAWIN *v.* WATSON.

Legacy — Construction —Restricte Absolute Gift—Demurrer.

A testator, after giving absolute be to three of his children, gave and beque to his daughter H. 1,000l. out of his reduced stock, and also 70l. a-year d her natural life, to be paid to her by quarterly payments after H. attaine age of twenty-one years and six mo which two sums he directed and devis be under the trust of his executors, viz to permit H. to assign the said annui any one, and the interest arising fro 1,000l., as it became due, to be paid t for her life, into her own hands, an receipt to be a sufficient discharge, e she married; and at her decease the 1, to be equally divided between her chil H. was unmarried and a minor at the of the testator, but married after att the age of twenty-one years and six m and then died, having had no issue. testator, by his will, devised all his

concerns in the funds, or in notes or estates mortgaged to him in fee, unto his executors, their heirs and assigns, it not being his intention that his heir-at-law should, in any way, be concerned therewith:—Held, on demurrer, that H. took only a life interest in the 1,000l. legacy; and that the same being a restricted gift, her representatives could not take under it.

John Watson, by his will, dated the 1st of January 1829, after making several absolute bequests and devises to his children Charles Alfred, Diana, and Octavius Watson, whom he appointed his executors, gave and bequeathed as follows, that is to say, "I give and bequeath to my daughter Harriet Watson 1,000*l.* out of my 3½*l.* per cent. reduced stock, and also 70*l.* a year during her natural life, to be paid to her in four quarterly payments, after she attains the age of twenty-one years and six months; which two sums I direct and devise to be under the trust of my executors, namely, not to permit my said daughter to assign her said annuities to any one, and the interest arising from the 1,000*l.*, as it becomes due, to pay the same to her, for her life, into her own hands, and her receipt shall be a sufficient discharge, even if she marry; and, at her decease, upon trust to divide the principal sum of 1,000*l.* equally between and amongst all and every her child and children. I further give and bequeath to my daughter Harriet Watson 10*l.* a year until she attains the age of twenty-one years and six months." The testator then bequeathed an annuity of 60*l.* in four quarterly payments to his daughter Maria Robinson, during her natural life; and, after appointing the trustees of his will, proceeded as follows:—"I devise all my money concerns in the funds, or in notes, bonds, or estates mortgaged to me in fee, whether freehold or copyhold, unto my said executors, their heirs and assigns, it not being my intention that my heir-at-law may in any way be concerned therewith, or be called on to assign, surrender, or reconvey the same when such mortgages are paid off; and I direct my said executors to pay all the said annuities and legacies." The testator died on the 29th of December 1829, leaving his daughter Harriet an infant and unmarried: she attained the age of twenty-one years and six months in 1834, when she intermarried with the plaintiff, and died in the year 1846, without ever having had a child; and the plaintiff having become her legal personal representative, filed the present bill against the executors, praying the declaration of the Court that the gift of the 1,000*l.* 3½*l.* per cent. reduced annuities was an absolute gift to Harriet, subject only to the trusts contained in the will for the benefit of Harriet during her life, and of her children, if she should have any; and that upon her death, without having had a child, the plaintiff became, as Harriet's legal personal representative, absolutely entitled thereto; or, if the Court should be of opinion that the same was not absolutely bequeathed to Harriet, then that it might be declared that the same sum, in the events that had happened, was undisposed of, and became distributable amongst the next-of-kin of the testator living at his decease. The defendants, the executors, filed a general demurrer to the bill.

Mr. Purvis and *Mr. F. Bayley*, in support of the demurrer, contended, that the gift to Harriet amounted to that of a life interest only; that the word "annuities," used by the testator, applied to the interest in the sum of stock, as well as the 70*l.* a year bequeathed to Harriet; that in all the decisions in favour of absolute gifts, where the words at all resembled the present, there was always found some speciality, as in *Whittell* v. *Dudin* (1); that no inference could be drawn from the other parts of the will as to the meaning of the testator in respect of the bequest in question; that the last part of a will must prevail where there was doubt as to the true construction of the former part of it; and that if the Court was of opinion that the daughter Harriet only took a life estate in the sum of 1,000*l.* 3½*l.* per cent. reduced stock, the defendants, the executors, and not the next-of-kin, would take the residue beneficially, including that sum, the will taking effect previously to the 1st of January 1838.

The other cases cited in support of the demurrer were—

Mayer v. *Townsend*, 3 Beav. 443; s. c. 10 Law J. Rep. (N.S.) Chanc. 216.

(1) 2 Jac. & W. 279.

Campbell v. *Brownrigg*, 1 Phil. 301; s. c. 13 Law J. Rep. (N.S.) Chanc. 7.
Gompertz v. *Gompertz*, 2 Phil. 107; s. c. *ante*, p. 23.
Ring v. *Hardwick*, 2 Beav. 352.
Hulme v. *Hulme*, 9 Sim. 644.

Mr. Kindersley and *Mr. Toller*, for the plaintiff, contended, that where a doubt arose as to the meaning of the testator with reference to the interest which a child was to take in a legacy, it was right to have recourse to other parts of the will; and that in the present case the testator had given clear absolute interests to three of his children, whose legacies, in the order in the will, preceded the bequest to Harriet; that interest on the 1,000*l.* 3½*l.* per cent. reduced stock was directed to be paid as it became due, and could not be intended to be paid quarterly like the annuity of 70*l.*; that there was no gift of the 1,000*l.* 3½*l.* per cent. reduced stock, to the executors or any one else, unless there was a gift of it to Harriet; and that, therefore, it must devolve to the next-of-kin of the testator, one of whom was represented by the plaintiff.

The MASTER OF THE ROLLS.—In this case, as in all other cases of the like kind, the question is, having regard to its general purport, what is the effect of the will? That is, whether the words by which the legacy is given import an absolute gift, modified only by subsequent restrictions, so that the gift may have its full effect in all cases in which the limitations and restrictions are not applicable, and in like manner paying regard to the whole will,—whether the effect of the legacy is to give a restricted gift, which is to prevail only according to the restrictions or limitations in the circumstances to which they are applicable and not further or otherwise?—that is the question.

In this case I confess I cannot find any general scheme of this will at all sufficient to afford me the least clue to the construction of this particular bequest; nor do I think, in a case where a testator himself providing for the benefit of his children shews such great variety of intention as this testator has shewn in the present case, that by any further consideration of the matter I could obtain the least light into his intention to enable me tc what he meant to give, and t what he meant to give to one l has given to others: I am, there the necessity of confining mys to the words of the bequest mad of this particular daughter, Harri [His Lordship here read the wc bequest.] It is a singularly ill- incorrect will; and as to my anything like a distinct and cles what the testator would have c events which have arisen had c his contemplation, there is no means afforded me to do so. I the words as they are, and upc consideration that I am able to matter, my opinion is that th does not amount to an absolut that it is a restricted and limite the testator had said (but which said), "I give the sum of 1,00 tees, for the benefit of my daught to pay to her the interest arisin during her life, with remainder dren after her decease." If y words used by the testator t really comes to this,—that the given and bequeathed to his dau riet Watson, a sum which he beq under the trusts of his executor restrictions and so far and no f I have mentioned; and not p think it can be made any clear at present, my opinion is that t stricted gift, and the next-of- legatee cannot take under it.

Demurrer allowed, with

M.R.
March 8. } STRATFORD *v.* RI

Heir-at-Law — Account of Profits—Suit by Creditors of Decree.

After decree for account c estate, and, in case of deficiency estate to pay debts, for sale o real estate, it was on further di dered, on the proceeds of person estates proving insufficient to pa that the heir-at-law of the inte account for the rents and prof by him of the descended real est

This was a creditors' suit, instituted on behalf of the creditors of a trader. By the decree in the year 1837, the usual accounts of the personal estate were directed to be taken; and in case of a deficiency of the personal estate, the real estate was ordered to be sold. The real estate was sold, but the produce thereof, together with the personal estate, proved insufficient to pay the debts. The case now came on for further directions, when

Mr. Roupell and *Mr. Shebbeare*, for the plaintiff, asked for an account against the heir of the rents and profits received by him from the death of the intestate.

Mr. Beavan, for the executors.

Mr. Glasse submitted that this could not be now done, as the point had been raised by the pleadings, and omitted in the former decree.

The MASTER OF THE ROLLS.—There is no doubt of the course of practice in such cases. The Court does not direct an account of the rents and profits in the first instance; but as soon as it appears that the purchase-money of the real estate is insufficient to make good the deficiency of the personal estate to pay the debts, an account is then directed against the heir of the rents and profits received by him.

Note.—See Garland *v.* Littlewood, 1 Beav. 527; 2 c. 8 Law J. Rep. (N.S.) Chanc. 369; Seton on Decrees, 86.

M.R.
1846.
July 23;
Dec. 14.
1847.
Jan. 22;
Feb. 8.

BROWN *v.* HOME.

Bill pro confesso—Preliminary Order—Decree—76th and 81st Orders of May 1845.

The order referred to in the 81st of the General Orders of Court of the 8th of May 1845, is only the preliminary order, that the record and writs clerk attend with the record of the bill at the hearing of the cause.

By the same Order, the practice is rendered uniform in all cases, whether there are several defendants or only one defendant to a bill.

A like practice must be pursued under the 76th of the same General Orders of Court, in the cases of defendants absconding, or being served with notice.

In this case, the bill was filed against a single defendant, who appeared thereto, but refusing to put in any answer, was attached under the ordinary process of the Court.

An order was made by the Court, on the 23rd of July 1846, that the clerk of the records and writs should attend with the record of the plaintiff's bill on the first cause day in the following Michaelmas term, in order that the plaintiff's bill might be taken *pro confesso*. The cause, pursuant to an order obtained by the plaintiff, having been set down, came on to be heard on the day appointed, and a decree was made that the bill be taken *pro confesso*. Some difficulty having arisen as to the proper form of the order to be drawn up,—

Mr. Glasse, on the 14th of December 1846, mentioned the circumstance to the Court, and called its attention to the 76th and 81st of the General Orders of the 8th of May 1845 (1), the latter Order requiring that the order of the Court to take a bill *pro confesso* should not be made on the same day on which the cause was heard.

The MASTER OF THE ROLLS stated, that the proper practice, whenever the plaintiff was in a situation to take a bill *pro confesso*, was to obtain an order of the Court to that effect, which would entitle the plaintiff at the hearing of the cause on a subsequent day, to ask of the Court a decree that the bill be taken *pro confesso*, but only such decree as the merits confessed entitled the plaintiff to; that the order referred to in the 81st of the General Orders of Court of the 8th of May 1845, for taking a bill *pro confesso*, was not the decree that the bill be taken *pro confesso*, but the preliminary order commonly termed the order to take the bill *pro confesso*; that where an order was sought to take a bill *pro confesso* against one of several defendants, the practice had been uniform. The preliminary order having been obtained, the cause was heard against the defendants not in default,

(1) Ord. Can. 311. 314; 14 Law J. Rep. (N.S.) Chanc. 291, 292.

and the clerk of records and writs attended with the record of the bill; the preliminary order was then read, and as against the defaulting defendant, the Court decrees the bill to be taken *pro confesso;* but the decree being framed on the merits confessed, a practice very irregular had crept in where there was a single defendant only to the bill, and he in default, viz. to procure the record and writs clerk's attendance on a seal day, and at the same time by motion to procure as well an order to take the bill *pro confesso* against the defendant as a decree on the merits confessed. The object of the 81st of the General Orders of the 8th of May 1845, was to provide in all cases whatsoever an uniform practice, viz. that in the first place the preliminary order should be obtained, then the clerk of the records and writs was directed to attend with the record of the bill; the cause was then set down, and the Court appointed a day for the hearing of it, which was attended by the same officer, and then the cause was heard, and the decree was made by the Court.

The Master of the Rolls added, that the like practice ought to prevail where defendants had absconded, or had been served with notice under the 76th of the same General Orders of the 8th of May 1845.

M.R. Jan. 16. } FLIGHT *v.* ROBINSON.*

Costs—Cross-bill—125th Order of May 1845.

If a cross-bill be filed bonâ fide *by the defendant to the original suit, against whom the original bill is dismissed with costs, the costs of it will usually follow the decree in the original suit, notwithstanding charges of fraud are alleged in it which are not sustained.*

The question now brought before the Court was, whether Flight, the defendant in the original suit, and against whom the bill had been dismissed with costs, should have the costs of the cross-bill filed by him. *Vide* 125th of the General Orders of the 8th of May 1845 (1), which dire costs of a cross suit to follow the r the principal suit, unless the Court order to the contrary.

Mr. Kindersley and *Mr. Chand* the defendants to the cross-bill, con that as the plaintiff to the cross-b therein charged the defendants with which he had wholly failed in provi had made no use of the answer filed t had, moreover, by means of written sions entered into by the parties, p the production of the documents r to his case, he ought to pay the cost cross suit.

Mr. Turner and *Mr. Rogers,* plaintiff in the cross suit, were not upon to address the Court; and

The MASTER OF THE ROLLS, after ing that a bill of discovery was reso because the plaintiff to it did not kn facts of the case, stated, that altho answer to it might shew that the l unnecessary, still it could not be all be asserted, that because the plaint filed a cross-bill, which he could n tain, he was to be deprived of the of the discovery sought; that the nothing to shew that the cross-bill filed *boná fide,* and therefore the co must follow the decree in the origina

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K. BRUCE, V.C. Jan. 23. } DENNING *v.* HENI

Vendor and Purchaser — Payn Money into Court.

Motion with the consent of all that a purchaser might pay his pu money into court without accepting t refused.

Mr. Bates moved, that a purchase pay his purchase-money into court accepting the title.

All the parties consented to the appl

K. BRUCE, V.C. said, that it w according to the unanimous opinion

* For the facts of this case see the report of the judgment at the hearing, 13 Law J. Rep. (N.S.) Chanc. 425.

(1) Ord. Can. 335; 14 Law J. Rep Chanc. 296.

registrars that the purchase-money could be paid into court, where the title was not accepted, even with consent, and declined to make any order on the motion.

WIGRAM, V.C. Feb. 1. } HARDING *v.* HARDING.

Administration Suit—Executor—Legacy—Retainer.

On motion by the plaintiffs (residuary legatees), that the executor, who was one of the pecuniary legatees under the will, should pay into court the amount admitted by his answer,—Held, that the executor was not entitled to retain the amount of his legacy before the accounts had been taken.

The testator in the cause died in November 1843, having, by his will, given various pecuniary legacies, amounting in the whole to 920*l.*, and amongst them, a legacy of 200*l.* to the defendant, the executor, and appointed the plaintiffs his residuary legatees. The bill was filed by the residuary legatees, some of whom were infants, against the executor for administration of the testator's estate, and charging the executor with breach of trust. The defendant, by his answer, admitted that the gross assets of the testator amounted to 1,470*l.*, and that he had employed part thereof in his own trade, and that he had paid the funeral and testamentary expenses and debts of the testator, and that there was now in his hands the sum of 820*l.*, out of which he claimed to retain his legacy of 200*l.*

The plaintiffs now moved for the payment of the 820*l.* into court.

Mr. Burdon, for the motion, contended, that an executor could not be allowed to retain a legacy given to him before the accounts had been taken: other creditors might have come forward to diminish the fund, and the several legacies might have to abate proportionally; and especially in a case where the executor's claim might be materially affected by the alleged breach of trust.

Tipping v. *Power*, 1 Hare, 405; s. c. 11 Law J. Rep. (N.S.) Chanc. 257.

Score v. *Ford*, 7 Beav. 333.

Mr. Torriano, contrà.—The bill states that all the debts are paid; and this statement must, upon the motion, be taken to be the fact.

WIGRAM, V.C.—In strictness, the plaintiffs are entitled to have this sum brought into court. There are cases in which the Court allows an executor to retain for costs and expenses; and sometimes, where the defendant has a clear interest in the fund, and it is proved that there is not any existing prior claim on the estate, the Court confines the amount to be paid into court to the interest of the plaintiffs. But, in this case, the sum claimed to be retained is a legacy, subject to be materially diminished by the state of the accounts, which are not yet taken. The Court cannot allow the retainer in such a case where it is proceeding to administer the whole estate, as that would be to make the other legatees run the risk of the executor's subsequent insolvency. The order must be made for the payment of the full amount.

V.C. Feb. 16. } DORVILLE *v.* WOLFF.

Legacy—Time of Vesting.

Bequest of an annuity to a lady, and after her death in trust for her children, for and towards their maintenance and support until they attained twenty-one, when each was to be entitled to claim a fair proportion of the principal:—Held, that the plaintiff, who was the only child that survived the annuitant, was entitled to the whole fund.

The testator, George Montague, by a codicil to his will, dated the 8th of February 1814, gave and bequeathed to his dear friend, Elizabeth Dorville, an annuity of 200*l.* for her life, and after her decease in trust for her children, Elizabeth, Henry, Arabella, and Georgiana Dorville, or the survivor or survivors of them, for and towards their maintenance and support until they severally attained the age of twenty-one years, when each would be entitled to claim a fair proportion of the principal; and in order to secure the said annuity of

200*l.* to his dear friend, E. Dorville and her children, the testator directed that a sum of money, sufficient to produce the said annuity of 200*l.*, be vested or disposed of in government stock in the names of his trustees.

The testator died shortly after the date of his will, leaving E. Dorville and her three children surviving.

A sum of stock, sufficient to answer the said annuity of 200*l.*, was set apart by the trustees, and the interest paid to E. Dorville during her life. E. Dorville died in 1844, leaving only one child, the plaintiff H. Dorville, surviving, who had attained the age of twenty-one: one of the other children had died under twenty-one, and the remaining two children died after attaining twenty-one. The plaintiff filed this bill, claiming to be entitled to the whole fund.

Mr. Bethell and *Mr. Collins*, in support of the bill, contended, that the testator intended those children only to take who survived E. Dorville; and cited the following cases:—

Blewitt v. *Roberts*, Cr. & Ph. 274; s.c. 10 Law J. Rep. (N.S.) Chanc. 342.

Pope v. *Whitcombe*, 3 Russ. 124; s.c. 6 Law J. Rep. Chanc. 53.

Wordsworth v. *Wood*, 4 Myl. & Cr. 641; s. c. 9 Law J. Rep. (N.S.) Chanc. 29.

Mr. Hodgson and *Mr. Glasse* argued, that the representatives of the deceased children, who attained twenty-one, were entitled to a share of the fund: the testator directed that they should all claim a fair proportion of the principal when they attained the age of twenty-one; the bequest was for the four children by name, and was clearly intended for their maintenance until twenty-one, at which period their shares would necessarily be vested in them—*Weedon* v. *Fell* (1).

Mr. Sheffield appeared for the surviving trustee.

The Vice Chancellor.—This appears to me a plain case. It is manifest that the testator considered this lady might die, leaving the children infants: that was the flow of thought in his mind. He gave the annuity to E. Dorville for life, and after her decease in trust for her children, or the survivors of them, for their maintenance and support until they should attain twenty-one. He assumes that they will be infants when their mother should die, and they were to be entitled to claim a fair proportion of the principal on attaining twenty-one. It appears to me that the testator meant those children only who should survive their mother to take a share in the fund. The plaintiff will therefore be entitled to the whole fund.

(1) 2 Atk. 123.

M.R. Feb. 22. } TURNER *v.* HUDSON.

Legacy — Construction — Classes — Distribution per capita.

A testator, after giving to each of his brothers and sisters (naming them) living at his death a pecuniary legacy, bequeathed the residue of his estate and effects to his executors in trust for his wife for her life, and after her decease upon trust to distribute the same, in equal shares and proportions (after first paying thereout the legacy previously given to each of his brothers and sisters then living), *between and amongst each and every of his brothers and sisters, and such of their children as should be* then living, *the parents and children to be classed together, and to share in equal proportions:—Held, that the residuary fund was distributable in equal shares* per capita *amongst such only of the brothers and sisters of the testator and their children as were living at the death of the testator's widow who survived the testator.*

Richard Hudson, by his will, bequeathed as follows:—"I also give to my brothers and sisters, John Hudson, Benjamin Hudson, Elizabeth Greatwick, Eleanor Alcock, and Ann Jones, or to such of them as shall be *living at the time of my decease*, the sum of 250*l.* each; but should my sister, Ann Jones, depart this life, her son, Benjamin Jones, is to receive the said 250*l.*, and be entitled to all such part or parts of my said estate and effects as the said Ann Jones would or might become entitled to in case she survived me." The testator then proceeded as follows:—"All the rest,

residue, and remainder of my estate and effects, whether real or personal, I devise and bequeath unto my executors hereinafter named upon trust to permit my wife, Catherine Hudson, to receive the rents, profits, dividends, and annual proceeds thereof to and for her own sole use and benefit during her life,—her own receipt to be a sufficient and proper discharge for the rents and dividends to be received by her; and from and immediately after her decease, upon trust, to sell my freehold house in Oxford Street, and also my leasehold houses by auction; and it is my desire that Mr. Edward Abbott be employed as auctioneer; and to convert the whole of my estate and effects into money, and to distribute the same, in equal shares and proportions (after first paying thereout the sum of 250*l.* to each of my brothers and sisters *then living*) between and amongst each and every of my brothers and sisters, (1) and such of their children as shall be *then living*, the parents and children to be classed together, and to share in equal proportions (the children of Mary Hill are not included)."

At the death of the testator the two brothers and three sisters named in the will were living, but one of his sisters, Elizabeth Greatwick, died in the lifetime of the testator's widow, leaving no issue; the others left issue, who were still living.

Mr. Kindersley and *Mr. Chandless*, for the plaintiffs, who were children of some of the testator's brothers and sisters, contended that all the brothers and sisters of the testator not living at the time of the death of the testator's widow, were excluded from the benefit of the residuary bequest; the object of the testator being to create a class to receive the legacy who should be living at the decease of the tenant for life.

Mr. Loftus Lowndes and *Mr. Roupell* appeared for other parties having the same interest as the plaintiffs.

Mr. Kenyon Parker, for the legal personal representatives of the deceased children of the brothers of the testator, referred to the terms of the bequest of 250*l.*, as indicating the time at which the residuary bequest was to take effect, the classes taking in equal shares and proportions.

(1) This comma is in the original will.

Mr. Turner and *Mr. Welford*, for the legal personal representatives of Elizabeth Greatwick, the deceased sister of the testator, contended, that the words "then living" must have reference to the death of the testator and not of his widow,—the testator, in the early part of his will, having given a legacy of 250*l.* to his brothers and sisters living at the time of his own decease.

The MASTER OF THE ROLLS, after adverting to the terms of the residuary bequest as not very accurately expressed, observed, that the testator had in contemplation parties living at the death of his wife, consisting of his brothers and sisters and their children, and had accordingly directed parents and children to be classed together; that he did not consider himself bound to refer to the former clause of the will, by which a bequest was made of 250*l.*, to each of the testator's brothers and sisters living at his death, and that therefore the residuary fund must be distributed in equal shares *per capita*, amongst the brothers and sisters of the testator, and their children living at the death of the testator's widow.

K. BRUCE, V.C. Feb. 24. } SEWELL *v.* GODDEN.

Process—Defendant out of the Jurisdiction—Orders of May 1845*—Amendment.*

The bill was filed after the Orders of May 1845 *came into operation. The defendant answered the bill, and went abroad. The plaintiff then amended his bill, and, under the* 26*th Order of May* 1845, *served the defendant's solicitor with a subpœna. Motion by the plaintiff, under the* 29*th Order of May* 1845, *for leave to enter an appearance for the defendant, refused.*

The original bill in this suit was filed after the Orders of the 8th of May 1845 had come into operation. The defendant appeared to the original bill, put in his answer, and went abroad. The plaintiff afterwards amended his bill, and, under the 26th Order of May 1845 (1), served the

(1) Ord. Can. 294; 14 Law J. Rep. (N.S.) Chanc. 287.

defendant's solicitor with a subpœna to answer the amended bill.

A motion was now made on behalf of the plaintiff, under the 29th Order of May 1845, for leave to enter an appearance for the defendant.

Mr. C. Barber, for the motion.

Mr. Speed, contrà, contended that this case was not provided for by the 29th Order. The words of the order are, "such defendant." These obviously refer to the kind of defendant mentioned in the beginning of the Order, "if any defendant not appearing," &c. He cited *The Marquis of Hertford* v. *Suisse* (2).

Mr. Barber, in reply, contended that there was a substantial difference between the case cited and the case before the Court. The bill in *The Marquis of Hertford* v. *Suisse* had been filed before the Orders of May 1845 came into operation, and the service on the solicitor in that case had been made, not under the Orders of May 1845, but under the Orders then in operation.

KNIGHT BRUCE, V.C.—I shall not depart from this authority. The Vice Chancellor of England has put an interpretation on the words "such defendant," and to this I shall adhere. I shall decline to make the order.

Motion refused.

K. BRUCE, V.C. Feb. 27. } TOWNE *v.* BONNIN.

Traversing Note.

The time for answering expired on the 23rd of January. The plaintiff filed a traversing note on the 3rd of February. The answer was engrossed on the 5th of February. Motion to take the traversing note off the file granted.

The bill in this case was filed on the 3rd of December 1846. The time for answering expired on the 23rd of January. The plaintiff filed a traversing note on the 3rd of February. On the 5th of February the answer was engrossed.

Mr. Rasch now applied, on the part of the defendant, that the traversing note might be taken off the file. He cited *Rigby* v. *Rigby* (1).

Mr. Egan, contrà.

KNIGHT BRUCE, V.C. ordered that the traversing note should be taken off the file.

M.R. March 6, 8. } HUBBARD *v.* YOUNG.

Legacy — Construction — Enjoyment in Specie.

A testatrix gave to her grand-daughter all her property, except certain pecuniary legacies, but, should her grand-daughter marry, then her issue were to be her heirs, but should her grand-daughter die, and not leave any issue, then her property was directed to be divided between other persons. The testatrix concluded her will, by observing, "that her property was in the Bank and India House." The testatrix's property, on her death, consisted of a sum of East-India stock, and 3½l., per cent. Bank annuities:—Held, that the dividends of those sums were to be paid to the grand-daughter during her life, and that those sums were not to be converted.

A testatrix bequeathed as follows:—"I give my property to my grand-daughter Elizabeth Matilda Hubbard, except 500*l.* I give to my niece Elizabeth Howorth;" the testatrix here enumerated other pecuniary legacies, and then proceeded as follows:—"Should my grand-daughter marry, I desire her issue may be her heirs; if she should die, and not leave any issue behind her, I give all my property to be divided between my sister Howorth's children and my brother Richard Sigery's daughter, and her children. If my daughter and myself should die before my grand-daughter is of age, it is my desire that Mrs. Jane Hubbard may have the care of her till she comes of age, which is to be at her twentieth year of age, at which time she is to receive the dividends herself, but not the principal—that is not to be spent. My property is in the

(2) 13 Sim. 489; s. c. 15 Law J. Rep. (N.S.) Chanc. 30.

(1) 6 Beav. 265.

Bank and India House." The question was whether the grand-daughter was entitled to enjoy *in specie* a sum of 1,000*l.*, East-India stock, and a sum of 3,090*l.*, 3*l.* 10*s.* per cents. belonging to the testatrix at her decease.

Mr. Kindersley and *Mr. Shapter*, for the grand-daughter, contended that she was entitled to the enjoyment of the stock *in specie*, and that the present inclination of the Courts was against conversion, and cited the following cases:—

Vaughan v. *Buck*, 1 Phil. 75.
Pickering v. *Pickering*, 4 Myl. & Cr. 289; s. c. 8 Law J. Rep. (N.S.) Chanc. 336.
Goodenough v. *Tremamondo*, 2 Beav. 512.
Bethune v. *Kennedy*, 1 Myl. & Cr. 114.
Hinves v. *Hinves*, 3 Hare, 609.
Collins v. *Collins*, 2 Myl. & K. 703.

Mr. Jervis appeared for the husband of the grand-daughter.

Mr. Rogers, for a defendant, whose interest was adverse to the grand-daughter, declined to argue the point.

Mr. Craig and *Mr. Wood*, for one of the parties entitled absolutely to the fund in the event of the grand-daughter surviving her issue, observed upon the cases cited on the opposite side, and referred to *Sutherland* v. *Cooke* (1).

Mr. T. H. Hall, for the trustees of the will, expressed a wish on the part of his clients, that the dividends of the stock might be ordered to be paid at once to the grand-daughter herself, and not through the intervention of the trustees.

The MASTER OF THE ROLLS, after adverting to the terms of the bequest, said, he could not, therefrom, collect a sufficient indication of intention of conversion to justify an investment of the funds in the 3*l.* per cent. Consolidated Bank Annuities, and that the fund must be enjoyed by the grand-daughter in specie, but that such order would be without prejudice to the ultimate rights of the parties and anything that might occur in the meanwhile.

(1) 1 Coll. 498; s. c. 14 Law J. Rep. (N.S.) Chanc. 71.

M.R. Jan. 28; March 12. } GIDDINGS *v.* GIDDINGS.

Costs, Security for—Plaintiff abroad—Security—Default of Plaintiff—Dismissal of Bill.

After an order had been made that the plaintiff, who was resident abroad, should, within a month, procure a sufficient person to give security for costs, and that, in the meantime, proceedings should be stayed; with which order the plaintiff neglected to comply: the Court directed the plaintiff's bill to be dismissed, with costs, in default of the plaintiff giving security for costs within six months.

On the 25th of November 1845, it was ordered that the plaintiff, who was living in America, should, within a month, procure some sufficient person on his behalf to give security for costs, and that, in the meantime, proceedings should be stayed. The plaintiff neglected to comply with the exigency of this order.

Mr. Heathfield now moved that the plaintiff's bill might be dismissed with costs. He cited

Camac v. *Grant*, 1 Sim. 348.
Cliffe v. *Wilkinson*, 4 Sim. 122.
Fort v. *the Bank of England*, 10 Sim. 616.
Veitch v. *Irving*, 11 Sim. 122; s. c. 9 Law J. Rep. (N.S.) Chanc. 327.

The plaintiff did not appear.

Mr. Kindersley, as *amicus Curiæ*, suggested that the Court would take into consideration the fact of the plaintiff being abroad.

The MASTER OF THE ROLLS, after directing the registrar to inquire into the practice, said, he would give his opinion on a future day.

March 12.—The MASTER OF THE ROLLS, on this day, after referring to *Cliffe* v. *Wilkinson*, *Camac* v. *Grant*, *Fort* v. *the Bank of England*, and *Veitch* v. *Irving*, said, that *Lautour* v. *Holcombe* (1), (in which the motion was in the alternative, and the Lord Chancellor stayed the proceedings) did not establish any authority contrary to the cases

(1) 1 Phill. 262; s. c. 12 Law J. Rep. (N.S.) Chanc. 167.

cited in support of the motion, and made an order that the plaintiff should within six months give security for the costs of the suit, and, in default, that the bill should stand dismissed, with costs.

M.R. March 11. } HORSLEY *v.* FAWCETT.

Bill, Amendment of—66th of Orders of Court of May 1845.

After three of four defendants to a bill had answered, the plaintiff obtained an order of course to amend, which he acted on; before any answer had been put in to the amendment, the plaintiff obtained another order as of course to amend his bill as he should be advised; and the bill was again amended by striking out of the bill the name of a person who had been made a party by the previous amendment, but who was at the date of the amendment dead, and substituting his legal personal representative in his place:—Held, that the order to amend was irregular.

This was a motion to discharge an order of course to amend, and to take the amendments off the file. The bill was filed against Fawcett and three other defendants; and after full answer had been put in by three of the defendants, the plaintiff, on the 19th of January 1847, obtained an order of course to amend, which he acted on. Before an answer had been put in to the amendments, the plaintiff, on the 5th of February 1847, obtained a second order of course to amend "as he should be advised," and he amended his bill accordingly.

A motion was now made to discharge, for irregularity, the second order to amend of the 5th of February, and that the amendments might be taken off the file.

Mr. Teed and *Mr. Collins*, in support of the motion, contended, that after an answer had been filed the plaintiff was only entitled to one order to amend as of course—66th Order of May 1845 (1).

(1) Ord. Can. 308; 14 Law J. Rep. (N.S.) Chanc. 290; and see Haddelsea *v.* Nevile, 4 Beav. 28; s. c. 10 Law J. Rep. (N.S.) Chanc. 233; Bertolacci *v.* Johnstone, 2 Hare, 632; s. c. 13 Law J. Rep. (N.S.) Chanc. 99; Davis *v.* Prout, 5 Beav. 375; s. c. 12 Law J. Rep. (N.S.) Chanc. 10.

Mr. Messiter, contrà, contended that the 2nd order to amend was not irregular, and stated that by the first amendment a Mr. Dixon had been made a defendant; but it having been discovered that he was dead at the date of the amendment being made, the second order to amend was obtained merely for the purpose of stating his death, and substituting his executors as parties, and stating the manner in which they had become his representatives. That such amendment was only formal in character, and came within the 65th of the Orders of May 1845, and that even if there had been a slip it would be useless to mutilate the record by expunging the amendments, which, on an application to the Master, would eventually be restored. He cited

Brattle v. *Waterman*, 4 Sim. 125.
Smith v. *Evans*, 1 Russ. & Myl. 80.
Wharton v. *Swann*, 2 Myl. & K. 362.
Nicholson v. *Peile*, 2 Beav. 497.

The MASTER OF THE ROLLS.—There can be no question that the second order of course is irregular, and it must be discharged. With that order the amendments must also fall, and the plaintiff must pay the costs of the application.

I do not consider the second amendment merely formal, as the addition of new parties, and the statements as to representation, might materially alter the situation of the defendants; besides which, the order is unlimited, *i. e.* to amend "as the plaintiff should be advised."

Having vindicated the practice of the Court, it ought to be considered how the matter can best be set right, without prejudice to either party.

Mr. Teed.—The plaintiff must, in regularity, apply for leave to the Master; but the Court having determined the point, the plaintiff will consent that the amendments should remain on the file, upon the terms of the defendants having six weeks' time to answer.

The MASTER OF THE ROLLS.—I am glad the plaintiff has assisted in setting the matter right, for without his consent I could not myself have got over the difficulty.

WIGRAM, V.C.
1846.
Dec. 11.
1847.
Jan. 14.

BULL v. PRITCHARD.

Devise, Construction of—Vesting—Remoteness.

Devise of real estate to trustees, upon trust, to pay the rents and profits to the testator's daughter for life, and after her decease to convey the property unto and equally between and among all and every her children "who should live to attain twenty-three years of age," and to their heirs and assigns for ever; and if there should be but one such child, then to such only child, &c.; and in case there should be no such child or children, or being such, all of them should die under twenty-three, without lawful issue, then over; with power to the trustees to apply the interest of each child's share for his maintenance, notwithstanding such share should not then be absolutely vested:—Held, that the attainment of the age of twenty-three years was part of the description of the devisees; and the devise being to a class, after a life in being, the limitations over were too remote.

Thomas Evans, by his will, dated in May 1809, devised all his freehold estates to John Milsom, Samuel Pritchard, and John Grumbrell, and to the survivors and survivor of them, and the heirs and assigns of such survivor, upon trust, to pay the rents and profits to his daughter, Mary Bull, during her life, for her separate use; "and from and after the decease of my said daughter, then I do hereby direct, limit, and appoint, that my said trustees, or the survivor of them, or the heirs or assigns of such survivor, do, by good and sufficient conveyances and assurances in the law, convey and assure my freehold estates unto and equally between and among all and every the child and children of my said daughter, Mary Bull, who shall live to attain the age of twenty-three years, and to his, her, and their heirs and assigns for ever, as tenants in common, and not as joint tenants; and if there shall be but one such child, then to such only child, his or her heirs or assigns for ever; and in case there shall be no such child or children, or being such, all of them shall die under the said age of twenty-three years, without lawful issue, then upon trust that my said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, do, by such like good and sufficient conveyance and assurance in the law, convey and assure my said freehold estates unto and equally between and amongst all and every my brother and sisters; namely, John Evans, Mary Spendlove, Elizabeth, the wife of John William Nevett, and Martha, the wife of John Milsom, and to his, her, and their respective heirs and assigns for ever, as tenants in common." Then, after bequeathing a leasehold specifically, the testator gave all the residue of his estate and effects to his executors, upon trust, to invest it in the public funds, and pay the dividends to his daughter, Mary Bull, during her life, for her separate use; "and from and after the decease of my said daughter, upon this further trust, to pay, assign, or transfer all and singular the rest, residue, and remainder of my said estate and effects, or the stocks or funds in which the same shall or may have been laid out unto and equally between and amongst all and every the child and children of my said daughter lawfully begotten, or to be begotten, who shall live to attain the age of twenty-three years, share and share alike, with benefit of survivorship, in case of the death of any or either of them under the age of twenty-three years, as tenants in common, and not as joint tenants; and in case there shall be but one child, then upon trust to pay, assign or transfer the same unto such only child, his or her executors and administrators; and in case there shall be no such child or children, or, being such, all of them shall die under the age of twenty-three years, without lawful issue, then upon trust to pay, assign, or transfer the same unto and equally between and amongst my said brother, John Evans, and my three sisters, Mary Spendlove, Elizabeth, the wife of John William Nevett, and Martha, the wife of the said John Milsom, share and share alike, as tenants in common." The three trustees were also appointed executors, with power to lay out and apply the interest of each child's respective share or so much thereof as they might deem necessary towards their main-

tenance, education, and bringing up, notwithstanding such child's share should not be then absolutely vested.

The testator died in January 1817. Mrs. Bull, who was his only child, had at that time one daughter, Mary Bull, who was then about fifteen years of age, and died in November 1820, without issue. Mrs. Bull had no other children. A considerable part of the testator's property consisted of leaseholds for years.

In 1823, a bill was filed by Mr. and Mrs. Bull, against the surviving executor, and the persons who claimed under the ultimate bequests and devises, praying that the limitations and trusts created and declared by the will concerning the freeholds, leaseholds, and residuary personal estate of the testator, might be declared to be void for remoteness.

Upon the hearing of that suit in 1826, Lord Gifford thought that the case was not ripe for a decision as to the freehold estates; but as to the leaseholds, he held that the attainment of twenty-three years was a condition precedent to the vesting of any interest in Mrs. Bull's children, and, consequently, that the limitations over after her death were void for remoteness, and that the next-of-kin of the testator were entitled, subject to Mrs. Bull's life interest. On the death of Mrs. Bull, a bill was filed by the heir-at-law of Mary Bull, the daughter, insisting that upon the death of the tenant for life, the freehold estates became vested in the plaintiff as heir-at-law of Mary Bull, under the words of the will, and praying for a conveyance thereof from the heir-at-law of the surviving trustee named in the will, and for an account of the rents and profits accrued since the death of Mrs. Bull.

The cause came on for hearing on the 1st of December 1846; and the Vice Chancellor being of opinion that his decision upon the case would in effect be a review of Lord Gifford's judgment, directed that the plaintiff should apply to the Lord Chancellor to hear the case. The Lord Chancellor, upon the application being made to him, expressed an opinion that the Vice Chancellor should exercise his judgment upon the case, notwithstanding Lord Gifford's decision.

Mr. Romilly and *Mr. Heathfield*, for the plaintiff.—The interest of Mary Bull, under the will of the testator, was a vested interest in fee (subject to the life estate of her mother), with an executory devise over in the event of her death under twenty-three without leaving issue; and as the executory devise over is void for remoteness, the first devise became absolute in Mary Bull, and has descended to the plaintiff as her heir-at-law.

Bland v. *Williams*, 2 Myl. & K. 411; s. c. 3 Law J. Rep. (N.S.) Chanc. 218.
Doe d. *Dolley* v. *Ward*, 9 Ad. & El. 582; s. c. 8 Law J. Rep. (N.S.) Q.B. 154.
Doe d. *Hunt* v. *Moore*, 14 East, 601.
Phipps v. *Ackers*, 3 Cl. & Fin. 703.
Greene v. *Potter*, 2 You. & Coll. C.C. 517.
Festing v. *Allen*, 12 Mee. & Wels. 279; s. c. 13 Law J. Rep. (N.S.) Exch. 74.

The Court will struggle against interpreting the words of the will as implying a contingency.

Mr. Sidebottom, for the principal defendants.—In the case of a devise in remainder after a life estate, to the children of the tenant for life *who shall attain twenty-three years*, the attainment of that age is part of the constitution of the character of the original taker—*Newman* v. *Newman* (1). It is, in fact, a description of the persons to take as a class.

Duffield v. *Duffield*, 3 Bligh, (N.S.) 260.
Leake v. *Robinson*, 2 Mer. 363.
Bull v. *Pritchard*, 1 Russ. 213.
Jones v. *Mackilwain*, Ibid. 221.
Russel v. *Buchanan*, 2 Cr. & M. 561; s. c. 3 Law J. Rep. (N.S.) Exch. 194.

Mr. Romilly, in reply.—The cases cited by the defendants as establishing a contingency are all decisions upon personal property; as to which a stricter rule of construction prevails than in the case of real estate.

Mr. Williams and *Mr. Mitchell* appeared for other parties.

Jan. 14.—WIGRAM, V.C.—There are two classes of cases, under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, or when or if he attain a given age, followed by a devise over, if the first

(1) 10 Sim. 51; s. c. 8 Law J. Rep. (N.S.) Chanc. 354.

devisee should die under the given age. The second class is, where the description of the devisee is such as to make the given age part of that description, and the property is given over if the devisee dies under that age. In cases of the first class the Court has discovered an intention expressed in the will that the first devisee should take all that the testator had to give, except what he had given to the devisee over; and, in order to give effect to that intention, has held, by force of the language, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over — *Phipps* v. *Ackers*. In the second class, the Court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required: that otherwise he did not answer the entire description—*Festing* v. *Allen*, and the cases there referred to. Under which class, then, does this case fall? Clearly, I think, under the second class. It is not necessary that I should say whether greater violence would be done to the will in this case than was done in some of the cases of the first class (namely in *Doe* v. *Moore*), if I should hold that the children of the testator's daughter took vested interests. It is enough to say that the two cases are widely different in principle from each other; and that this case, in my opinion, clearly falls under the second class. Then, does the clause as to education, maintenance, and bringing up, alter the case? I think not. That such provisions are in many instances material upon questions of vesting cannot be disputed; but there is nothing unreasonable or improbable in giving the benefit of maintenance to the devisee of a contingent interest. The question is here, whether I can allow that clause to have any effect upon the description of the devisee, which, without that provision, makes the age of twenty-three years part of the description of the devisee? I think not. The devise is not to the children "at," or "when," or "if"; but in effect to such only as attain the age of twenty-three years; and the interim gift has no legitimate bearing upon that question.

V.C. Jan. 15. } *In re* LUNN'S CHARITY.

Trust—1 *Will.* 4. *c.* 60. *s.* 10.—*Deceased Trustee*—*Stock.*

The Court will not make an order under the Trustee Act, 1 *Will.* 4. *c.* 60, *for the transfer of stock standing in the name of a deceased trustee whose next-of-kin refuses to administer.*

This was a petition presented under the 10th section of the statute 1 Will. 4. c. 60, for the appointment of new trustees in respect of certain trust property, and that some proper person might be appointed to transfer the said trust fund into the names of such new trustees.

The trust fund was standing in the Bank of England, in the names of four trustees, the last of whom had died intestate, and his next-of-kin refused to take out letters of administration to his estate.

Mr. Malins, in support of the petition, contended that the next-of-kin of a surviving trustee came within the words of the 10th section of the 1 Will. 4. c. 60, and that under this section the Court had power to direct some person to transfer the fund for the next-of-kin of the deceased trustee. If this were refused by the Court, it would put the parties to very considerable expense in citing the next-of-kin, who was at present resident in America, and in obtaining letters of administration. The case of *Ex parte Hagger* (1) was cited, and *Ex parte Winter* (2).

Mr. Roundell Palmer appeared for the Bank of England, and submitted to act as the Court should direct.

The VICE CHANCELLOR.—It does not appear to me that the cases which have been cited are sufficient authority for me to grant this petition. In *Ex parte Hagger* the executor did not renounce: he was, in point of law, an executor; and for the purpose of extending the benefit of the act, the Court will consider the executor who has not renounced to have so much the character of executor as to be brought within the meaning of the words. The second case, *Ex*

(1) 1 Beav. 98.
(2) 5 Russ. 284.

parte Winter, is analogous to the former. The character of executors was still remaining, though the full power was not vested in them. This case is very different: the next-of-kin of the trustee has no sort of representative character in him. He has a mere contingent interest—a mere power to obtain the character by some act not yet done. Under these circumstances, I think the next-of-kin is in no sense within the meaning of the act. It is, however, very desirable that such a case should be provided for; and I have no doubt, if the subject were represented in the proper quarter, a short act of parliament, similar to that passed in the last session for abolishing deodands, might easily be obtained within a very short period, and the difficulty would then be got rid of.

Petition dismissed.

V.C. Feb. 27. } WATSON *v.* BIRCH.

Limitations, Statute of, 3 & 4 Will. 4. c. 27. —Judgment — Charge upon Personalty — Creditors' Suit.

The petitioner claimed a sum of money due from the estate of a testator on a judgment entered up on a bond given in 1793. *The Statute of Limitations was set up as a bar, and it was contended that the statute did not apply to a charge upon personal estate, and that a suit instituted in* 1817 *against the testator's estate, would prevent the statute from running. That suit was for the arrears of an annuity due to the party who instituted it, and it prayed that the estate might be administered, and that certain documents, which were in the possession of the obligee, and upon which he claimed a lien in respect of the money due upon the bond, might be produced, and the lien, if any, of the obligee might be ascertained:—Held, that the Statute of Limitations was a bar to any proceedings upon a judgment after twenty years, although such judgment was a charge upon personal estate only, and that the suit of* 1817 *was not in the nature of a creditors' suit, and there was not such an acknowledgment of the debt due upon the judgment as would prevent the statute from running.*

This case came on upon the
Mary Elizabeth Rudd, for the co
of the Master's report, by which it
that the petitioner, as the perso
sentative of Richard Rudd, was
brancer upon the estate of Samue
respect of a sum of 3,751*l.*, due
cipal and interest upon a bond gi
said S. Birch to R. Rudd, in the y
and a counter petition, in the nat
ceptions to the Master's report, wa
by Richard Hopkins, the repres
the said S. Birch, setting up t
of Limitations, 3 & 4 Will. 4.
a bar to the petitioner's claim.
had been given to R. Rudd, w
solicitor, in payment of a bill o
professional services. There we
dorsements on the bond: one wa
for one year's interest on the mon
thereby, dated the 20th of April
the other was a receipt, in 1798, f
of 318*l.*, "in respect of costs tax
decree." Judgment had been
on the bond. S. Birch died
The petition stated that a su
Fraser v. *Elder* was institute
by John Fraser against the repr
of S. Birch, to compel paym
arrears of an annuity; which
that certain documents and paper
in a chest which was in the po
R. Rudd, the solicitor, relate
of the plaintiff's property; th
R. Rudd claimed a lien upon t
ments in respect of a sum of 1
interest, owing to the said
upon a bond given him by t
Birch; and that Richard Rudd
to produce the documents until
said lien was satisfied. That
a decree that the usual account
taken of the estate and effects
and for the application thereof
course of administration; tha
if any, which the said R. Ru
upon the aforesaid documents
ascertained and secured, and pai
the priority in which he might
stand; and that the chest, lett
and documents in the possessio
of the said R. Rudd might be
and that the plaintiff might
thereto in the usual manner. R.
in 1826, without having put in

to the said bill, and the petitioner, M. E. Rudd, was appointed sole executrix of his will.

A bill of revivor was subsequently filed against M. E. Rudd, who, by her answer, admitted the possession of the chest containing documents belonging to the estate of S. Birch, but claiming a lien upon the said documents in respect of the judgment for 2,793*l.* entered up on the bond of 1793; and she submitted to the Court whether she had not still a lien upon the deeds and documents, and whether such lien ought not to be ascertained and satisfied. A decree was made in the suit in August 1834, which was entitled in that and two other suits filed for the administration of the estate of S. Birch, whereby it was directed that the plaintiff's bill should be dismissed as against all the defendants except the personal representatives of S. Birch and M. E. Rudd, with costs; and it was referred to the Master to ascertain what was due to the said J. Fraser for arrears of his annuity; and it was ordered that the residue of the estate should be sold, and what was found due to the other incumbrancers upon the estate should be paid to them according to their priorities. The petitioner, M. E. Rudd, then presented a petition praying that it might be referred to the Master to take an account of what was due from the estate of S. Birch to the petitioner as the personal representative of R. Rudd, upon the before-mentioned bond and judgment. Upon a reference under this petition, the Master, by his report, dated the 23rd of December 1846, found that the said M. E. Rudd was an incumbrancer upon the estate in respect of the said judgment debt, and that there was due to her, for principal and interest, the sum of 3,751*l.*, and that there was no other incumbrance upon the estate of S. Birch.

Mr. Bethell, *Mr. Spurrier*, and *Mr. Ellis*, in opposition to the Master's report, contended that the judgment debt was barred by the Statute of Limitations, 3 & 4 Will. 4. c. 27. The 40th section of that statute enacted, that "no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment was given." The words of this section were applicable to the present case, and the term "judgment" applied to personal estate as well as charges upon land. There was nothing which had occurred in the suit of *Fraser* v. *Elder* to take the case out of the statute. That suit was instituted for the purpose of obtaining payment of the arrears of an annuity; and R. Rudd, the original obligee, was only made a party for the production of deeds on which he claimed a lien in respect of an alleged judgment debt. It was not a suit instituted on behalf of all the creditors of S. Birch's estate; and, therefore, it did not come within the decision of the following cases:—

Sterndale v. *Hankinson*, 1 Sim. 393;
Berrington v. *Evans*, 1 You. & Coll. 434;
Farran v. *Beresford*, 10 Cl. & Fin. 319;

in which the bills were filed on behalf of all the other creditors upon the estate.

Mr. Koe and *Mr. J. Parker*, in support of the Master's report, contended that the Statute of Limitations did not apply to a case where the charge affected personal property only; it was intended to apply merely to where the judgment was upon real estate. It was also contended, that the statute would not run against this particular claim of the petitioner, M. E. Rudd. By the suit of *Fraser* v. *Elder*, instituted in 1817, it was prayed that the usual accounts might be directed to be taken of the estate of S. Birch, and that the proceeds might be applied in a due course of administration. It was also prayed that the lien, if any, of the said R. Rudd might be ascertained. That bill was not dismissed as against the petitioner, which clearly shewed that she was a party to the suit as an incumbrancer, and not

merely for production of documents. It was already established, that a suit for administration would prevent the Statute of Limitations from running; and this case was precisely within that principle.

Mr. Bethell, in reply, urged that there was no reason whatever for limiting the effect of the word "judgment" in the statute to a charge upon land. The suit instituted in 1817 was for a reference to the Master, to ascertain who were the incumbrancers upon the estate; and it was evident that R. Rudd, who, from being a solicitor, was cognizant of all the circumstances, did not consider that in that suit there was to be any inquiry for the purpose of establishing his claim, since he allowed so many years to pass before his death, which took place in 1826, without putting in his answer.

The Vice Chancellor.—When the case was opened, my attention was occupied with this point,—whether the fund was to be considered as land or not; but I think it is quite unnecessary to enter into that question, as the language of the statute is general that "no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years," &c. Now, there is nothing in the use of the word "judgment" that necessarily points to a case, in which the proceedings are prevented from being applicable to a judgment which, in its nature, can only operate on personal estate. It seems to me, that the legislature having mentioned these three things particularly,—first, a mortgage, then a judgment or lien, and having afterwards gone on to say, "or otherwise charged upon or payable out of any land or rent," that the intention was, that there should be no proceeding on a judgment simply after twenty years; therefore, I think this case is concluded, unless there had been something in the proceedings upon the bill filed in 1817 to shew that the party had an incipient right before the statutory bar. Now, I cannot make out that there was such a right. I have looked to see if this bill was a creditors' bill; but it appears that, as represented by this lady's own petition, the bill prayed, amongst things, "that the usual directions mi given for taking the accounts of the and effects of the said S. Birch, and application thereof in a due course of nistration; and that, under the c stances aforesaid, such chest, and the and papers and other documents t contained, and which are or were possession or power of the said R. might be lodged in some safe place that the lien, if any, which the sa Rudd had thereon might be ascert and secured and paid to him in the p in which he might be found to stand that all necessary directions might be to ascertain the amount of such lien, if It was admitted that it was not a l one creditor on behalf of all the cre The decree was then made; and it a to me, that the decree is as unlike a directing all the creditors to go in the Master as well could be, and mor ticularly as to Rudd; for, so far from ting that he had any right to the sum s to have been claimed by him, the bill —"And that the lien, if any, mig ascertained, and secured and paid to The decree, after giving other directio affecting this part of the case, directed what should be found due to the oth cumbrancers upon the said fund shou paid to them, according to their resp priorities." There is no direction wh to treat Rudd as a creditor: none wha And the parties felt it so; for, until the was made on the petitioner, there was no done for the purpose of the decree of from which M. E. Rudd could have ha benefit. Then, this decree was ma petition, "that it might be referred b the Master to take an account of wha due to the petitioner as the personal sentative of R. Rudd, under and by of the said judgment." But what d Court do upon that petition? Inst acceding to the form of the prayer, it a general decree "that it should be re to the Master to inquire and certif were the incumbrancers other than J. mentioned or referred to in and by the dated the 5th of August 1834, and wha due to such incumbrancers respecti There is, therefore, no acknowledgme the petitioner's right. It appears t

that the language of the statute is imperative, and binds this case; and that the Master was wrong in finding this or any sum due to M. E. Rudd.

WIGRAM, V.C. Feb. 26, 27; March 18. } KIRWAN *v.* DANIEL.

Trust—Debtor and Creditor.

A, the owner of estates in the West Indies, upon which B. had an annuity charged, empowered B. to arrange with a firm in London, to receive the consignments, and, in consideration thereof, to make the necessary remittances and to pay the charges upon the estates. B, as the agent of A, entered into an agreement with D. & Co. that they should make such remittances and provide for the charges upon the estates (including B.'s annuity), and that the produce of the estates should be consigned to D. & Co. in repayment of such advances. The consignments were made accordingly, and D. & Co. for some time paid B.'s annuity, but afterwards refused to continue such payments. The bill was filed by B. against A. and D. & Co. for payment of the arrears of his annuity out of the consignments. On demurrer, by D. & Co. for want of equity, held, that D. & Co., by the subsequent payments of B.'s annuity on the footing of the agreement, had given him an interest in the deed, and a right of suit, and the demurrer was overruled, with costs.

The bill stated, that in and previously to the year 1841, John F. Kirwan and the plaintiff (his uncle) were owners in undivided moieties of the Farm and Waterwork Plantations at Montserrat, in the West Indies, and that J.F. Kirwan was at that time also the owner of the Old Road Plantation, subject to a rent of 200*l.*; that in October 1841 the plaintiff conveyed his interest in the first-mentioned plantation to J. F. Kirwan, in consideration of an annuity of 300*l.*, charged upon the premises, and secured, together with other annuities, by a term of 1,000 years; that in October 1841, J. F. Kirwan was desirous of making arrangements with some mercantile house in London, for consigning to them the produce of the said several plantations, they undertaking to ship such supplies as might be required from this country for the said estates, and also to provide for the payment of the rent of the said plantation called the Old Road, and of the annuity of 300*l.* secured to the plaintiff as aforesaid; that the plaintiff was fully authorized and empowered by the said J. F. Kirwan to arrange and agree with any mercantile house in London who might be willing to undertake the same for the consigning to them the produce of the said plantations, upon their undertaking to provide for the shipping and supplies, and making such payments as aforesaid, upon such terms and conditions as the plaintiff might think reasonable; that in October 1841, the defendants, Thomas Daniel and John Daniel, then and now carrying on business as merchants in London, under the firm of Thomas Daniel & Sons, were desirous of becoming consignees of the produce of the said plantations, and were willing, in consideration thereof, to undertake to ship the necessary supplies for the same, and to provide for the payment of the rent of 200*l.* and of the plaintiff's annuity of 300*l.*, and also to honour the bills which might be drawn by the said J. F. Kirwan, for the proper cultivation and management of the said estates, upon the terms and conditions contained in the agreement thereinafter set forth; that N. Mayo and H. Mayo, then carrying on business as West India brokers, under the firm of N. & H. Mayo, had, in October 1841, or alleged that they had, some claim or lien upon the said estates, or some of them, and that the said proposed agreement having been communicated to them, they consented to join therein as thereinafter mentioned; that on the 29th of October 1841, an agreement of that date was duly made between the plaintiff, as such agent of the said J. F. Kirwan as aforesaid, and also on his own behalf as aforesaid, and the said T. Daniel and J. Daniel, and the said N. Mayo and H. Mayo, and which was duly signed by the plaintiff and the other parties thereto, and was as follows:—

"London, 29th of October 1841.—It is agreed between J. F. Kirwan, Esq., of Montserrat, represented by his uncle Matthew Kirwan, Esq. (the plaintiff) and Messrs. N. & H. Mayo, and Messrs. Tho-

mas Daniel & Co., of &c., that Messrs. Daniel & Co. shall honour the bills drawn by J. F. Kirwan for the proper cultivation and maintenance of the said plantations, and also for the payment of 200*l.*, the annual rent of the Old Road estate; and also that they should ship such supplies as might be required from this country for the said properties, and pay Mr. Matthew Kirwan, quarterly, commencing from the 1st of October now last past, 75*l.* in discharge of his annuity of 300*l.*, secured on the Farm and Waterwork Estate: the whole produce of the said estates to be sent to Daniel & Co., in repayment of such advances; and until the same are fully liquidated, they, the said Daniel & Co., undertaking, should there be a surplus in their hands, after the said liquidation, to pay over the said surplus to N. & H. Mayo, in part-payment of interest and principal of a claim they have, &c., but Mayo & Co. not to be precluded from otherwise realizing their claim."

That in pursuance of the said agreement, J. F. Kirwan had, from and since the date thereof, consigned, and still continued to consign to Daniel & Co., who had, from time to time, duly received the produce of the several plantations and estates mentioned in the agreement. The bill then stated that the defendants, the Daniels, had for some time continued regularly to pay the said annuity to the plaintiff, but had then discontinued paying the same, and that a large sum of money was then due and owing to the plaintiff, in respect of arrears of the annuity, and that upon the plaintiff applying to them for payment to him of such arrears, and of the future payment of the said annuity, they had refused to comply with such request.

The bill which was filed against J. F. Kirwan, Daniel & Co., Mayo & Co., and the trustees of the term of 1,000 years, prayed an account of the consignments received by Daniel & Co., and an account of what was due to the plaintiff for the arrears of his annuity, and for payment of what should be found due, and of what should, from time to time, become due to him in respect of the arrears of the said annuity, during such time as Daniel & Co. should continue to receive the produce of the said plantation.

To this bill the defendants, Daniel & put in a general demurrer.

Mr. Rolt and *Mr. Dickinson*, for th murrer.—Very different considerations to the case of a settlor making a volu disposition of his property, and the c a debtor transferring property to his tr in trust to pay his debts. In the fo case the Court will enforce the de favour of the *cestui que trust*, if the be executed; but in the latter the de regarded by the Court as an arrange made by the debtor for his own benefit that third persons, not parties to the have no concern with it; and that though the creditor should have noti the deed.

Williams v. *Everett*, 14 East, 582
Walwyn v. *Coutts*, 3 Mer. 707; 3 Sim. 14.
Garrard v. *Lord Lauderdale*, 3 Si s. c. 2 Russ. & Myl. 451.
Fitzgerald v. *Stewart*, 2 Sim. 333; 2 Russ. & Myl. 457.
Bill v. *Cureton*, 2 Myl. & K. 503; 4 Law J. Rep. (N.S.) Chanc. 98
Malcolm v. *Scott*, 3 Hare, 39; s. Law J. Rep. (N.S.) Chanc. 57.
Browne v. *Cavendish*, 1 Jones & 606.

There must be something on the cred part amounting to a distinct consider or implied contract to enable him to upon the deed. In the present cas plaintiff was a party to the deed mere the agent of J. F. Kirwan.

Mr. Romilly and *Mr. Heathfield*, fo bill.—The allegation in the bill tha agreement was made by the plaintiff wit Daniels on his own behalf, must upon th murrer be taken to be true. The deed co tutes a solemn engagement by Daniel & to pay the plaintiff his annuity, for upon understanding Daniel & Co. obtained consignments—*Lilly* v. *Hays* (1), *Hut son* v. *Heyworth* (2); and it is an ir cable appropriation of the funds after a —*Walker* v. *Rostron* (3), *Re Douglas*

(1) 5 Ad. & El. 548; s. c. 6 Law J. Rep. K.B. 5.
(2) 9 Ibid. 375; s. c. 8 Law J. Rep. (N.S.) 17.
(3) 9 Mee. & Wels. 411; s. c. 11 Law J. (N.S.) Exch. 173.
(4) Mont. & Ch. 1.

ilin v. *Walton* (5), *Wilding* v. *Richards*). The subsequent payments of the an-ity prove the assent of the defendants, d they are bound to continue those pay-ents so long as they receive the consign-ents—*Acton* v. *Woodgate* (7).

Mr. Dickinson, in reply.—The plaintiff attempting to enforce a deed which J. F. irwan may revoke at any moment; and ere is nothing to prevent the plaintiff from ing J. F. Kirwan for the annuity; no aim is alleged on the ground of forbear-ce. In *Lilly* v. *Hays* there was an ex-ess agreement between the principal and e third party, and the agent had assented.

Hutchinson v. *Heyworth* it was held at the agreement was irrevocable. In *alker* v. *Rostron* the principal agent and editor were all parties to the agreement. e creditor must be a party to the agree-ent, either expressly or by the course of aling.

WIGRAM, V.C.—In cases of this class, en the Court holds that the creditor has right to sue, it proceeds upon the prin-ple that the trustee may refuse to account any one else except the author of the st. In this case, the plaintiff having limited power to make what arrangement pleased with the consignees, makes him-lf a party to the agreement merely as the gent of J. F. Kirwan; and it is not im-ssible that Daniel & Co. may have stipu-ted that it should be so. The important oint, however, is, that Daniel & Co. have ted under the agreement, and made pay-ents upon the footing of the deed. As he point raised by this demurrer is one of great nicety, I think I shall do best to exer-ise that discretion which the Court always reserves in such cases of overruling the de-murrer, and reserving both the point and the costs until the hearing, especially as the decision in *Garrard* v. *Lord Lauderdale* has often been questioned.

March 18.—WIGRAM, V.C.—This case was argued before me on demurrer to the bill; and the point I had to determine upon the demurrer was, whether the doctrine laid down in *Garrard* v. *Lord Lauderdale* applied to this case; that is, whether, this being a case in which property had been conveyed to a trustee in trust to pay creditors, and that order having been to some extent acted upon, the annuitant could enforce the payment of his annuity by suit, I overruled the demurrer, but without giving any opinion whether, upon the case as stated in the bill, the plaintiff could sustain his suit or not. I did so upon the authority of the doctrine laid down by Lord Redesdale, in his *Pleading*, that the Court may always exercise a discretion, declining to decide a point upon a demurrer; and I thought it best to pursue that course here, because it is not once in a thousand cases that the wording of the bill actually corresponds with the truth of the case; and therefore I was called upon to decide a very difficult and important point of law, where, probably, a word in the answer might avoid all difficulty; and I was apprehensive of unnecessarily coming, or appearing to come in conflict with the case of *Garrard* v. *Lord Lauderdale*. It happened, however, that the case of *Malcolm* v. *Scott* came on to be argued before me a few days afterwards, before the order in the present case had been drawn up; and as all the cases were cited and argued upon in *Malcolm* v. *Scott*, it appeared to me the examination of those cases in *Malcolm* v. *Scott*, might enable me to express an opinion if the parties desire it in this case. I do not at all wish to retire from the position the case is in; but if the parties like to hear the conclusion I have come to, I will state it. It is the same conclusion as that which I had come to upon overruling the demurrer, though I abstained from stating it, in order to avoid any apparent conflict with *Garrard* v. *Lord Lauderdale*.

Now the facts of the case are these: it appears that a gentleman of the name of J. F. Kirwan was the owner of some property at Montserrat, in the West Indies; he was the nephew of the plaintiff, and the plaintiff was his agent. The plaintiff was entitled to an annuity of 300*l.* a-year, payable out of the plantations in question. The owner of the estate, J. F. Kirwan, was desirous of making arrangements with some one in this country to send out consign-

(5) 2 You. & Col. C.C. 354.

(6) 1 Coll. 655; s. c. 14 Law J. Rep. (N.S.) Chanc. 211.

(7) 2 Myl. & K. 492; s.c. 3 Law J. Rep. (N.S.) Chanc. 83.

ments to the West Indies, for the due cultivation and management of the estates, and he authorized, according to the allegations of the bill, the plaintiff to make arrangements with some one in this country for that purpose, and also for payment of the plaintiff's annuity of 300*l.* a year, as well as a rent of 200*l.*, payable to another person. There is some question on the construction of the agreement I am about to mention as to whether the annuity was to be payable at all events by the consignees, or whether it was only to be payable out of such consignments as they received; but as the bill states that they have received consignments sufficient to pay the annuity, or to pay it in part, that alternative becomes immaterial. Now the plaintiff, according to the allegations in the bill, having had this commission, entered into an arrangement with the defendants, the Messrs. Daniel, in the month of October 1841, which was as follows—[his Honour read the agreement]. Then the bill goes on to allege that Messrs. Daniel did thereupon become the consignees; that they did accept bills, that the produce was consigned to them, and that they have, up to a certain time mentioned, regularly paid the annuity; and that they then discontinued paying it, insisting that the plaintiff, being no party to, and having no ultimate interest under the agreement in question, has no right to sue for his annuity, although, of course, J. F. Kirwan, as the author of the deed, might have compelled them to pay it. Now I do not mean to go into the question again about the effect of that agreement; it appeared to me that the Messrs. Daniel might probably have a right to say that, although the plaintiff appears to be the agent, yet as the agreement is made with him as an agent for another person, whose name is a party to the agreement, they did not by that arrangement intend to give any right to Matthew, merely by his being mentioned as the agent. They might very well say, We are quite content to be liable to those with whom we are dealing, whose bills we accept, and from whom we receive the consignments; but we will not be liable to a third person. Therefore I give no opinion whether, on the agreement alone, the plaintiff would have a right to sue. The question is, whether he would have a right to sue, in consequence of the of his annuity under the deed. I that ground that I was extremel hensive that a decision on the might appear to conflict with th *Garrard* v. *Lord Lauderdale*, a c in one of its bearings is of some So far as that case follows *W Coutts*, as reported, and altoget reported, in Mr. Merivale's Rep authority of the case I shall assur impeachable, although, in *Garrar Lauderdale*, the creditors were parties to the deed. That case, went much further than *Walwyn* In that case the trustees gave not deed to the creditors, of whom th was one, and who were named the third part, and whose debts w paid; and the Court held that t was immaterial. The case to th is, I believe, a case of the first in and the decision was certainly upon those in whose favour it nounced. The argument was, tha *per se* gave no interest to the cre consequently, that notice could n the effect of the deed; that may b far as the effect of the deed is c but the argument omits the mate deration, that, although the notic alter the effect of the deed, it ma position of the creditor; and co of law and equity, have repeatedl that, where a creditor on whos stake has been deposited by the d a third person receives notice of that notice will convert the st into an agent for that creditor; cases have been decided on the gr the creditor may have forborne the faith of the notice he has recei late cases at law, which were ci bar, are very strong, and in princi not distinguish them from a trust as in *Garrard* v. *Lord Lauderdale* not, however, have presumed to m remarks, were it not for the obser the Master of the Rolls in *Acton gate;* the observations of the san Judge in an unreported case, of wl furnished with a note by Mr. many years ago, and the observati Edward Sugden in *Browne* v. *Ca* well as the difficulty always felt in

the case of *Garrard* v. *Lord Lauderdale*, in the particular alluded to. It appears to me however, that I can decide this case without being in any danger of impeaching that authority. It appears to me that the case of *Fitzgerald* v. *Stewart* has a material bearing upon the question; and I refer particularly to the Lord Chancellor's observations in that case, the same Judge who decided *Garrard* v. *Lord Lauderdale*, that, in the case of an annuity, the annuity is to be treated as an entire sum, and not merely as a succession of accruing payments; and that where the annuity is paid by the trustee, the trustee thereby makes himself liable afterwards to the payment of the annuity. I do not by this decision in the least degree contravene *Garrard* v. *Lord Lauderdale*; but I do not extend it: as I before observed, the same Judge decided the one case and the other. The order, therefore, which I made at the conclusion of the argument will stand; and the parties, if they think fit to appeal, may now take it that the case has been decided by me.

Demurrer overruled, with costs.

M.R. Mar. 3, 4. } JODRELL *v.* SLANEY.

Answer — Insufficiency — Exceptions — Pleading.

Where the interrogatory in a bill has reference to particular circumstances, it is not enough for the defendant to answer generally; and in a bill seeking an account of receipts and payments, where the defendant was interrogated whether he did not in fact receive, and whether or not on behalf of the plaintiff, several or some and which of the sums therein mentioned from the several or some and which of the persons at the several or some and which of the times thereinafter mentioned, viz., on the day of March 1837, *or at some other stated time, from Sir R. P. J., the sum of* 100*l.*, *&c. or how otherwise, and from whom and when and on whose behalf, it is not a sufficient answer to state a denial of the defendant that he received on the plaintiff's behalf the several or any or any one of the sums from the several or any or any one of the persons at the several or any or any one of the times mentioned, and in particular that he received, in the month of March* 1837, *or at any other time before or during the period to which the account referred to in the bill extended, on the plaintiff's behalf, from Sir R. P. J. or any other person or persons, the sum of* 300*l.* *or any other sum, save as by the said account appeared, &c., or that he received the sums mentioned in the bill or any or any one of them from the persons in the bill mentioned, or any or any one of them, &c. The plaintiff is entitled to know whether the sums mentioned in the bill were received by the defendant, coupled with the statement whether they were received by the defendant on the plaintiff's behalf.*

By deed dated the 28th of May 1836, to which the defendant Slaney and Sir Richard and Lady Jodrell were parties, it was (amongst other things) arranged and agreed that Sir R. and Lady Jodrell should make an allowance to their eldest son R. P. H. Jodrell, then under age, through the agency of the defendant, of 800*l.* a year, for his maintenance and education, Sir R. paying 500*l.* and Lady Jodrell 300*l.* a year. Mr. R. P. H. Jodrell having attained his majority in 1839, Sir R. Jodrell, by deed, charged some freehold property with 800*l.* a year in his favour, which was from time to time paid to the defendant, as the agent of Mr. R. P. H. Jodrell; and the defendant having, up to December 1840, according to his statements, advanced a sum of 580*l.* to Mr. R. P. H. Jodrell beyond the amount received by him, and having consented to lend Mr. R. P. H. Jodrell a further sum of 600*l.* (which he afterwards advanced), to enable Mr. R. P. H. Jodrell to pay his debts, the rent-charge of 800*l.* was conveyed by Mr. R. P. H. Jodrell to the defendant, by a deed dated the 18th of December 1840, to secure the total amount due, viz., 1,180*l.* and interest. The defendant, at a subsequent period, ceased to receive the rent-charge, and in June 1845 he tendered an account of his receipts and payments between May 1836 and December 1840, thereby shewing a balance due to him of 1,180*l.*, whereupon a bill was filed by Mr. R. P. H. Jodrell against the defendant, seeking an account of his receipts and payments, and praying that the deed of the 18th of December 1840 should stand as a security for so much only as might, on taking the proper accounts, be

found due from the plaintiff to the defendant. The bill contained the following allegation, viz., that upon an inspection and examination of the account rendered by the defendant, the plaintiff had discovered, and it was the fact, that in such account the defendant had not debited himself with, or in any manner given the plaintiff credit for, divers large sums of money which the defendant in fact received for and on behalf of the plaintiff between the 28th day of May 1836 and the date of the said indenture of mortgage of the 18th day of December 1840; and the bill alleged, in particular, that the defendant in fact received for and on the plaintiff's behalf the several sums of money from the several persons and at the several times following, that is to say, the defendant received on the plaintiff's behalf, on the day of March 1837, from the said Sir R. P. Jodrell, the sum of 300*l.*; on the 1st day of July 1837, from the said Dame Amelia Caroline Jodrell the sum of 200*l.*; on the 25th day of February 1840, from the said Dame A. C. Jodrell the sum of 100*l.*; on the 4th day of March, from James Oldham Swettenham the sum of 200*l.*; and on the 16th day of December 1840, from the said Dame A. C. Jodrell, the sum of 100*l.*

The interrogatories founded on the preceding allegations were as follows, viz., whether the said W. H. Slaney did not in fact receive, and whether or not for and on the plaintiff's behalf, the several or some or one and which of the sums of money from the several or some or one and which of the persons at the several or some and which of the times hereinafter mentioned, that is to say, on the day of March 1837, or at some and what other time, from the said Sir R. P. Jodrell, or from some and what other person or persons, the sum of 300*l.* or some and what other sum; on the 1st day of July 1837 or at some and what other time, from the said Dame A. C. Jodrell, or from some and what other person or persons, the sum of 200*l.* or some and what other sum; and whether the said defendant did not also receive the following sums from the following persons at the times following, for and on behalf of the plaintiff, that is to say, also on the 25th day of February 1840, or at some and what other time, from the said Dame A. C. Jodrell, or from some and what other person or persons, the sum of 100*l.* or some and what other sum; on the 4th day of March 1840, or at some and what other time, from the said J. O. Swettenham, or from some and what other person or persons, the sum of 200*l.* or some and what other sum; and on the 16th day of December 1840, or at some and what other time, from the said Dame A. C. Jodrell, or from some and what other person or persons, the sum of 100*l.* or some and what other sum, or how otherwise, or which of those several sums did the said defendant receive, and from whom and when and on whose behalf?

The defendant, by his answer, denied that, in the month of March 1837, or at any other time, before or during the period to which the said account extended, he received for or on the plaintiff's behalf, from the said Sir R. P. Jodrell, or from any other person or persons, the sum of 300*l.*, or any other sum, save as in the said account appeared, or that on the 1st of July 1837, or at any other time before or during the period aforesaid, he so received from the said Dame A. C. Jodrell, or from any other person or persons, the sum of 200*l.*, or any other sum, save as in the said account appeared; and he also denied that, on the 25th day of February 1840, or at any other time before or during the period aforesaid, he so received from the said Dame A. C. Jodrell, or from any other person or persons, the sum of 100*l.*, or any other sum, save as in the said account appeared, or that, on the 4th of March 1840, or at any other time before or during the period aforesaid, he so received from the said J. O. Swettenham, or from any other person or persons, the sum of 200*l.*, or any other sum, save as in the said account appeared, or that, on the 16th of December 1840, or at any other time before or during the period aforesaid, he so received from the said Dame A. C. Jodrell, or from any other person or persons the sum of 100*l.*, or any other sum, save as in the said account appeared, or that he received any, or any one of those several sums, from any person or persons at any time or times, on behalf of the plaintiff. The defendant then stated, that, in respect of the said other sums in the said bill particularly specified, he, in so far as he received the same, or any or any one of them, or any such sums, or sum, from the said Sir R. P. Jodrell and Dame A. C. Jodrell, received

the same for other purposes than for the use or on the account of the plaintiff, and duly applied the same to such purposes, and duly accounted with the proper parties in respect thereof. The plaintiff excepted to the defendant's answer, following in his two exceptions the words of the interrogatories. The Master allowed the exceptions taken, and the defendant, having excepted to the Master's report, the exceptions now came on to be argued.

Mr. Temple and *Mr. Spurrier*, in support of the exceptions to the report, contended that the allegation contained in the bill, that the defendant had received sums of money from particular persons at stated periods, did not entitle the plaintiff to require from the defendant an account of monies received by him from all persons, and at all times of a man's life, whether received on behalf of the plaintiff or not; and that the discovery sought must be limited in all cases to the subject-matter of and charges contained in the bill. The observations of Chief Baron Alexander in the case of *Bally* v. *Kenrick* (1), and *Mountford* v. *Taylor* (2), were referred to on behalf of the defendant.

Mr. Kindersley, *Mr. Turner*, and *Mr. Hardy*, for the plaintiff, contended, that all that was required of the defendant was a statement by him whether the specific sums mentioned in the bill, and stated to have been received by the defendant on certain specific days, had or not been received by him, and if yea, whether or not on the plaintiff's behalf; that the present case was clearly distinguishable from the case of *Mountford* v. *Taylor*, inasmuch as in the latter a general answer was given to a general question, whereas, in the present case, sifting and particular inquiries were made of the defendant.

The Master of the Rolls.—By means of a very slight alteration in the bill the plaintiff might, without raising any doubt whatever, have clearly entitled himself to the discovery sought by him. I quite give credit to the statement made at the bar that the defendant meant to put in a full answer, and whether he has done so I have now to determine. Everyone who has had any experience in preparing answers will concur in the observations of Chief Baron Alexander, in the case of *Bally* v. *Kenrick*, as to the difficulty of avoiding exceptions, as well on the ground of insufficiency of the answer as of impertinence, the great object of the pleader being to steer between the two extremes: in such cases there is a species of verbal criticism to be exercised, in which different persons will take different views. In the present case the bill seeks an account of certain payments made, and which the plaintiff alleges were payments made by Sir R. Jodrell and Lady Jodrell, *i. e.* sometimes by the one and sometimes by the other, to the defendant, and the payments in question are those that were made between the 28th of May 1836, and the 18th of December 1840. We have, first, a general statement of payments made that are omitted in the account furnished by the defendant; and then we have a particularization of the payments of certain sums omitted in the same account, the allegation in the bill being that, in March 1837, the defendant received from Sir R. Jodrell, on the plaintiff's account, 300*l.*, and so on. Now there are many circumstances comprised in that allegation alone; for instance, there is a statement of the fact of the receipt by the defendant, of the times of such receipt, of the persons who made the payments, the object in respect of which the payments were made, and the amounts of the sums so paid also: all those things are involved in the allegation, and form the subject of the inquiry. There is more difficulty than is usually supposed in drawing the interrogatories to a bill, though they are generally left to the care of clerks. Some difficulty, in the present case, may have arisen on account of the interrogatories having been drawn in a complicated manner: it amounts to this, the subject-matter being certain payments, and the time during which the payments were made being fixed, and the persons making them being Sir R. and Lady Jodrell, it is asked by the bill whether such payments were made at any other and what time, or by any other and what persons or person; and it is said, that is an inquiry that applies to all times of a man's life, and to Sir R. Jodrell or any other person; and that the Master cannot be right unless he

(1) 13 Price, 291.
(2) 6 Ves. 788.

meant this to extend to every part of a man's life. But nothing so strange as that position could be allowed. With a part of Mr. Temple's argument I quite concur, namely, that the payments inquired after must have relation to what is stated on the record. Then, with reference to the time, it is comprised within particular dates, as already observed, and if payments before or after those dates were stated in the answer, they would be irrelevant. The persons who made the payments in question were Sir R. and Lady Jodrell, and they might not have made the payments with their own respective hands. If Sir R. Jodrell had given a cheque, or paid a sum to the defendant through the agency of a servant, it would have been matter of inquiry here, and would, doubtless, be a payment made by him to the defendant. Is there then any foundation for what is urged by the defendant, viz., that if the inquiry by the bill had been as to anything that took place at any time, the Master, on the principle laid down by him, must have allowed the exceptions? Certainly not; and the question is, whether, having regard to the circumstances and allegations contained on the record, the answer is sufficient. If it had been said in the answer, "I did not receive these monies at the particular times stated in the bill, or if I did, I did not receive them on the plaintiff's account," that would be satisfactory. The answer ought to apply itself to the sums specified in the bill; but it does not do so here, and does not state that the sums inquired after were not received on the plaintiff's behalf. The answer is not, in my opinion, sufficient; and the plaintiff is entitled to be informed whether the particular sums in question were received by the defendant, and if so, whether they were not received on the plaintiff's behalf. The costs must be costs in the cause, if a full answer be put in by the defendant within four weeks.

L.C. Feb. 27; March 10. } BUTCHART *v.* DRESSER.

Company—Registered Public Officer—Production of Documents—Act 7 Geo. 4. c. 46, Construction of.

A bill was filed against A. as the registered public officer of the Yorkshire Banking Company. A. by his answer stated that he had ceased to be such public officer, and that B. then was the public officer of the company:—Held, that under the terms of 7 Geo. 4. c. 46. s. 9, it was not necessary to file a supplemental bill, or to obtain any order for the purpose of bringing the new public officer before the Court.

Under the circumstances of the case, the Court ordered the production of documents admitted by A. to be in the possession of the company; the notice of motion being served on A, and the new public officer of the company.

The plaintiff in this suit, on the 11th of February 1847, moved, before the Vice Chancellor of England, for an order upon the defendant Dresser, as the public registered officer of the Yorkshire Banking Company, or upon the said company, or the directors thereof, for production of certain papers and documents of the bank without prejudice to an injunction which had been obtained.

The bill was filed, on the 17th of September 1846, against Dresser, as the registered public officer of the company, for an account and for an injunction to restrain the company from proceeding in an action commenced by them against the plaintiff.

It appeared that the plaintiff had issued an attachment against Dresser for want of answer, whereupon, on the 14th of December 1846, he put in a full answer with the privity of the bank, setting forth a schedule of the documents in their possession, and offering to produce the documents if the bank would permit; but, at the same time, stating that he had ceased to be the secretary of the company, and that Scott had been appointed in his place. Scott's name, however, had not been entered in the register. In the return made to the Stamp-office, on the 13th of March 1846, Dresser appeared as the public officer of the company, and in the next return made on the 10th of November 1846, Scott appeared as such officer.

The notice of motion was directed to A. B, the solicitor or agent for the defendant, H. Dresser, and was to the effect that the order made by the Vice Chancellor might be discharged, and an order made in con-

formity with what had been asked from his Honour, or that it might be ordered that the suit might be prosecuted against the company in the name of Scott, as the present public officer of the company, instead of in the name of the defendant H. Dresser, and that the plaintiff might be at liberty to amend his bill by substituting the name of Scott in lieu of the name of H. Dresser, as such public officer; and that it might be ordered that Scott, as such present public officer of the company, and the public officer for the time being of the company, and also the company might be bound by the answer put in by Dresser, or that otherwise it might be ordered that the answer put in by Dresser might be taken off the file, with costs to be paid by Dresser or by the company; and in such case, that Scott, as such present public officer of the company, might be ordered to put in an answer to the bill, and in case the answer of Dresser should not be taken off the file, but the company should be bound thereby, then that the time for amending the bill might be enlarged. The motion came on before the Lord Chancellor on the 27th of February 1847, when, in consequence of the notice being directed to Dresser, his Lordship ordered the case to stand over, in order that Scott and the banking company might be served with notice of the motion. The motion again came on before the Lord Chancellor on the 10th of March 1847.

Mr. Rolt and *Mr. Bagshawe*, for the plaintiff, in support of the motion.—On the 13th of March 1846, Dresser was the registered officer of the company; the company appeared by him as their public officer. The plaintiff had no notice that Dresser had ceased to be such public officer. The bank are bound by his acts and by his submission to produce. They referred to 7 Geo. 4. c. 46. ss. 6, 8 and 9.

Mr. Bacon, for the defendant and the banking company.—The company are willing to adopt the answer of Dresser; the plaintiff, however, should pursue the regular course. He should file a supplemental bill. The act only provides that suits are not to abate.

Mr. Stuart and *Mr. Tillotson*, for Dresser, submitted that the proper course was for the plaintiff to obtain an order that the suit should be carried on in the name of the new registered officer. They cited a case of *Lord Mostyn* v. *Burdekin* (unreported on this point) in which Burdekin (the original defendant) having ceased to be the public officer of the Manchester Bank, the Master of the Rolls had made an order that the suit should be carried on in the name of the new public officer. They contended that the plaintiff must pay the costs of the present motion.

Mr. Teed, amicus Curiæ, stated that the Master of the Rolls had made the order referred to under the idea that something must be done to bring the new registered public officer before the Court.

The Lord Chancellor.—There is no change of interest, no supplemental matter, to make a supplemental bill necessary. Where a woman party to a suit marries, you only name the husband in future proceedings. Take the order in the terms of the motion.

A discussion then took place as to Dresser's costs. On behalf of the plaintiff, it was contended that Dresser's answer was substantially the answer of the bank; he should have put in a short answer, stating that he was no longer the public officer; or should have sent a letter to the plaintiff. He said, the bank choose to adopt me, and put in their answer by me.

[The Lord Chancellor.—It is not a question of the costs of the answer, but of Dresser's costs of this motion.]

Mr. Rolt.—If the plaintiff had not brought him here, he would have been met by this argument: you must have the party before the Court who has taken upon himself the character of representative of the bank.

The Lord Chancellor.—The plaintiff has properly made him a party as the representative of the bank. Dresser had no authority to interfere in the suit. He had ceased to be the public officer: the bank, instead of communicating this fact, allow him to put in an answer for them. Whether the service of Dresser was strictly regular or not, he cannot object to having been served. It is the consequence of his own act. It is clear the company will pay his costs. He must not have them from the

plaintiff. The order for production is to be upon the bank undertaking to be bound by his answer. I make no order for the introduction of Scott's name. Nothing more is necessary than to change the name in the proceedings.

WIGRAM, V.C. Feb. 24. L.C. March 26. } HUGHES *v.* WILLIAMS AND OTHERS.

Publication—Order—Irregularity.

After an order to enlarge publication, irregularly obtained, one of the defendants, with notice of the order, but treating it as a nullity, set down the cause under the 116th Order of May 1845, and served subpœna to hear judgment. On motion by the plaintiff the cause was ordered to be struck out of the registrar's book, and the subpœna set aside at the costs of the defendants; an order, although irregularly obtained, being binding on all parties until set aside.

On the 7th of January 1847, being the day upon which publication would pass, Lawrence, one of the defendants in the cause, obtained a warrant returnable on the 11th, to attend an application to enlarge, and served the same upon the plaintiff, but not upon the other defendants. The Master enlarged publication until the 20th of February, the plaintiff and Lawrence alone attending the warrant. Upon the other defendants, the De Wintons, threatening to dismiss for want of prosecution, the plaintiff, by letter, informed them of the existence of the order of the 11th, enlarging publication. The De Wintons, notwithstanding such notice, under the 116th of the General Orders of May 1845 (1), set down the cause for hearing on the 9th of February, and served subpœna to hear judgment. On the 24th of February the plaintiff moved that the cause so set down might be struck out of the registrar's book, on the ground that publication had not passed, and that the subpœna and the service thereof might be set aside, and that the defendants, at whose instance the cause had been set down, or Lawrence, might pay the costs of this application and consequent thereon.

Mr. Wood and *Mr. Shapter*, for the motion.—Even admitting the order of the Master to be altogether irregular, either for want of service of the warrant on the other defendants—*Bridges* v. *Branfill* (2), or that the warrant was not obtained in time—*Carr* v. *Appleyard* (3), the plaintiff is in no default; he is bound to respect the order until it is set aside, as are also the other defendants—*Chuck* v. *Cremer* (4). Those of the defendants who have been the cause of the irregularity must pay the costs of this application.

Mr. Freeling, for the defendants De Winton.—The want of jurisdiction in the Master to make the order is so obvious, that these defendants have a right to treat it as a nullity; and especially as they have not yet been served with notice of the order. The plaintiff must pay the costs of Lawrence, who has been unnecessarily brought before the Court upon this motion.

Mr. Chandless, for Lawrence, asked for his costs.

WIGRAM, V.C.—I cannot enter into the question whether the irregularity of the order of the 11th of January was more or less obvious. The regularity or irregularity of the order is immaterial. An order subsists, of which the De Wintons had notice, and until they set aside that order, they must respect it. The defendant Lawrence must be paid his costs of this motion. It is true he obtained the order, but that order must be considered as good till set aside; and the plaintiff is proceeding upon it as a valid order. But as the plaintiff has brought Lawrence here unnecessarily, he must pay him his costs.

March 26.—An appeal by the De Wintons from so much of the order of the Vice Chancellor as related to them, was dismissed by the Lord Chancellor with costs.

(1) Ord. Can. 331; 14 Law J. Rep. (N.S.) Chanc. 296.

(2) 9 Sim. 643; s. c. 10 Law J. Rep. (N.S.) Chanc. 14.

(3) 2 Myl. & Cr. 476.

(4) 2 Phil. 113; s. c. *ante*, p. 92.

V.C.
Feb. 13.
L.C.
Feb. 27.

MORRIS *v.* MORRIS.

Injunction—Waste—Ornamental Timber.

A tenant for life, without impeachment of waste, pulled down a mansion-house and rebuilt it in a more eligible situation, and this act was not complained of by the remainder-man. But an injunction was granted to restrain the tenant for life from destroying timber which had formed an ornament and shelter to the original mansion.

This was a motion on behalf of the plaintiff, who was the eldest son of the defendant, Sir John Morris, for an injunction to restrain the defendant from felling or cutting down any timber or other trees standing in or upon the lawn, garden, pleasure-grounds, or park, of Clasemont, in Glamorganshire, which had been planted or left growing there for the ornament, shelter, and protection of the mansion-house.

The bill stated, that by an indenture of settlement, dated the 8th of June 1819, certain freehold, copyhold, and leasehold estates, including the said mansion-house and property at Clasemont, and the barony or lordship of Skitty, in Glamorganshire, and all other the manors or lordships, messuages, lands, tenements, and hereditaments, in Glamorganshire, belonging to Sir J. Morris, since deceased, were conveyed and assured by Sir J. Morris to trustees, their heirs and assigns for ever, to the use of Sir J. Morris, deceased, for life; and after his decease to the use of the trustees for the term of 1,000 years, upon the trusts thereinafter expressed concerning the same, and upon the expiration or sooner determination of the said term, and in the mean time subject thereto, to the use of the trustees, their executors, administrators and assigns, for and during the life of the defendant Sir J. Morris, without impeachment of waste, provided the same be committed or suffered with the privity and assent of the defendant Sir J. Morris, upon trust, to preserve the contingent uses and estates thereinafter limited from being defeated or destroyed; and upon further trust, that the trustees should permit and suffer the defendant Sir J. Morris, during the term of his life, to receive the rents, issues, and profits of the manors and other hereditaments for his own use and benefit, and from and after the decease of the defendant Sir J. Morris, to the use of the plaintiff, his eldest son, during his life, without impeachment of waste, and after the determination of that estate, by forfeiture or otherwise, in the lifetime of the plaintiff, to the use of the trustees during his life, in trust, to preserve the contingent uses, but nevertheless to permit and suffer the plaintiff and his assigns, during his life, to receive the rents, issues, and profits, of the said manors and other hereditaments, to and for his and their own use and benefit; and immediately after his decease, to the use of the first and every other son of the plaintiff, in tail male, with divers remainders over, and with the ultimate remainder to the use of Sir J. Morris, deceased, his heirs and assigns for ever. And in the said indenture was contained a proviso that it should be lawful for the trustees, by the desire and at the direction of the tenant for life for the time being, to demise on lease any of the lands and hereditaments contained in the said indenture of settlement, upon building leases in manner therein directed. That upon the death of the said Sir J. Morris, the defendant entered into the possession of the estates comprised in the said indenture of settlement, and shortly afterwards pulled down the mansion called Clasemont, and had lately caused to be felled a great number of trees which had been planted for the ornament or shelter of the mansion-house, and that he intended to cut down others of the said trees.

Affidavits were filed in opposition to the motion for an injunction, stating that it had been the intention of Sir J. Morris, deceased, previously to his death, to pull down the mansion-house at Clasemont, in consequence of the great increase in the number of copper-smelting furnaces in the neighbourhood, the smoke from which had not only become very disagreeable, but was also most injurious to the health of persons resident there; that the defendant had, therefore, carried out the intentions of his father, and had pulled down the mansion-house at Clasemont, and had built another house for the residence of himself and family upon the estate called Skitty, which was distant about six miles from Clasemont; that con-

sequently the trees planted round the mansion-house at Clasemont were no longer ornamental trees; that they had arrived at full maturity, and were in a proper state for being felled; and that the detrimental effects of the copper smoke rendered it desirable that the trees should no longer be left standing at Clasemont.

The plaintiff, by his affidavits, stated that the mansion-house at Clasemont had been pulled down when he was only eight years of age; that when he was old enough to form an opinion respecting the act of waste thereby committed, he had disapproved of what his father had done, but he had hitherto raised no objection to it; that the present intentions of his father in felling the ornamental trees would prevent any house being rebuilt at Clasemont, and he denied altogether that there were any injurious effects produced by the smoke from the copper-works.

Mr. J. Parker and *Mr. Beales*, for the motion, cited the cases *of Wellesley* v. *Wellesley* (1) and *The Duke of Leeds* v. *Lord Amherst* (2); and contended that the defendant had no right to cut down the ornamental timber at Clasemont. The act of waste which he had committed in pulling down the mansion-house was submitted to; indeed, the plaintiff was too young at the time to raise any objection to it; but still the defendant was not justified in committing a further act of waste in felling the trees, for this would prevent any mansion-house being built at Clasemont at a future period, and it would greatly prejudice the right which every tenant for life had, under the settlement, to let the ground upon building leases. It was evident that the smoke from the copper-works was not considered by every one as being injurious, or the grandfather of the plaintiff would never have fixed upon that site; and if he had not found that objection, it was very possible that future owners of the estate might choose the same situation for rebuilding the mansion-house. It was also contended that the trees, having been originally planted for ornament, and having come within the protection of the law, by reason of the trusts of the settlement, that protection was not taken away by the mansion-house being pulled down, and whatever might become of the house, the right of the remainder-man to have the trees protected still existed.

Mr. Bethell and *Mr. Rasch*, contrà, urged that it had become necessary, owing to the unhealthy atmosphere arising from the proximity to the copper-works, that the mansion-house should be removed; that this was the original intention of the settlor, and that a benefit had thereby been conferred upon the estate; that the trees planted round the mansion-house at Skitty would take the place of those which had formerly surrounded the house at Clasemont; that the act of pulling down the mansion-house at Clasemont not having been objected to, there could be no reason now for protecting the timber, which no longer formed an ornament or shelter to any house. The suggestion that it was likely another house might be built at Clasemont was totally without foundation, since it was evident the situation would never again be advantageous, owing to the great increase in the number of copper-works; and owing to the numerous veins of copper, it was more than probable that the site would, in a short time, be so undermined, that it would be dangerous to build in the same place; and even if the land were let on building leases it could only be suitable for labourers' cottages, and the ornamental timber would then be useless; and the trees having now arrived at maturity, it was the most fitting time to cut them down, particularly as there was evidence to shew that the smoke from the copper-works was frequently known to injure the growth of timber.

The Vice Chancellor.—It appears to me the simplest case possible. It is much to be regretted that a case of this kind should be brought forward. It is a very painful thing to see a son asserting his rights against his father under any circumstances; but still, if the son has rights, they must be protected. There is one thing observable in this case, and that is that Sir John Morris, strictly speaking, has himself no right whatever to cut the timber, because he has no legal estate. As I understand it, the estate is limited in remainder to the two gentlemen who were named as trustees during his life

(1) 6 Sim. 497.
(2) *Ante*, p. 5.

without impeachment of waste, in trust for him; and it is remarkable that it is without impeachment of waste provided it be not complained of by the defendant Sir J. Morris. Strictly speaking, therefore, he has not any right. However, the parties here have made no objection on account of the trustees not being parties to the record, nor do I think it at all affects the substance of the case. It comes to this, then, that the son, who, as I understand it, has a legal estate for life in remainder, complains of the act which is done by his father, who is the *cestui que trust* of the freehold estate in possession, which is vested in the trustees during his own life, but in trust for him.

Now, it appears to me, that the general rule regarding trees planted for shelter and ornament must apply to this case, unless, upon the face of the settlement, or circumstances independent of the settlement, you can shew that the rule is not applicable. I admit that this case differs very widely in some respects from the case of *Wellesley* v. *Wellesley*; but I observe that there is here an express power to demise to persons who shall be willing to build houses or improve houses; and I cannot but think that, as far as that goes, it does tend to sustain the right of those in remainder to have the trees preserved which were originally planted for shelter and ornament; because, though the mansion-house itself no longer exists in respect of which the ornament and shelter would be properly considered, yet there is a possibility of leases being made for the purpose of building houses which may receive a benefit from the ornament or the shelter given by these trees, and in that respect it is something like the case of *Wellesley* v. *Wellesley*. But my opinion is, that I am bound to administer the general law of this Court, which will not permit the person who is merely tenant for life, without impeachment of waste, to cut down trees which, it is admitted on all hands, were planted for shelter and ornament; and my opinion is, that the injunction must be granted to restrain Sir J. Morris from cutting down any of the trees planted for shelter and ornament, which are growing upon the lands conveyed by the settlement.

The defendant moved, before the Lord Chancellor, that the order of the Vice Chancellor might be discharged.

Mr. Rolt and *Mr. Rasch* supported the motion.

The Lord Chancellor (without hearing the counsel for the plaintiff).—I quite concur in the opinion expressed by the Vice Chancellor, that we must regret that such an issue between father and son should have been brought into court; but at the same time I cannot alter the course that the Court ought to adopt in administering equity on that ground. And upon the question of law, as the Vice Chancellor described it to be, it is a plain case. Here is property on which, anterior to the date of the settlement, there was standing a house of some description, and a certain quantity of timber, which at that time constituted timber protected under the description of and expressly mentioned as ornamental timber. In 1819 a settlement was made, under which the property is conveyed to trustees for the life of the tenant for life, and a provision is inserted for the cutting of the timber, provided it be with the consent of the tenant for life. Now, I do not advert to that question—that is not made a ground of complaint—but, beyond all doubt, it is a strong circumstance to shew that it is or rather might have been brought forward as a ground in this case, which has not occurred, and does not exist in other cases, because the author of the settlement clearly did not intend to leave it to the discretion of the tenant for life to cut ornamental timber; he meant that he should have no discretion of the sort. But that is not made out, because I consider the case as between the tenant for life and the remainder-man.

At that time this house existed; it had not been pulled down: but it appeared that the author of the settlement did not live there, having gone to live with his son; and it also appeared that at that time, and anterior to that time, he had commenced building or preparing to build upon another estate, which he had purchased in the neighbourhood; leaving the fair inference that when that building should be completed he would make that his residence, and not the house he formerly resided in. Under the terms of the settlement, this house, together with the other

part of the property, was settled on the defendant for life, with remainder to the eldest son for life, and other persons in tail. Now the son was born in 1813. In 1820 the tenant for life pulled down the house. The son, of course, was an infant of tender years at the time, and nothing whatever can be raised to impeach his title from what took place when he was seven or eight years of age.

Then we find the house subject to the settlement, with certain timber about it. Now, if nothing more had taken place, nobody can for a moment contend that the timber was not to be protected. It is the ordinary case. What has taken place since the date of the settlement becomes perfectly immaterial: it is not because a house becomes a less desirable or agreeable place of residence, that the tenant for life is to assume to himself the discretionary power of judging whether trees are ornamental or not, or whether they shall continue to stand there. He has no dominion over them, nor can he acquire any by a circumstance which may or may not vitiate the value or the quality of the property in question.

Then, it is said, the only ground on which this could be put in argument is, that there is a manifestation of intention on the part of the author of the settlement (although this was another circumstance to shew that the timber would be protected as ornamental),—there is evidence to shew that he had abandoned it previously to the settlement, and that he no longer treated it as property of that description, and that it is no longer to be treated as timber being left standing for ornament. What are the facts upon which we are to come to this inference in derogation of the ordinary right of parties entitled to protect timber as ornamental? It comes to this: the settlement was in 1819; the house was of considerable standing, and built in 1770, and it is not matter of dispute that the trees in question were planted or left standing for the ornament of the house; but it is said that, being a mining district, it deteriorated the value of the property, rendered it a less agreeable place than formerly, and that the settlor had in consequence abandoned it altogether.

It appears, no doubt, that not only had he, some years before, become proprietor of an adjoining estate, but, as early as the year 1797, preparations were commenced for building a new house on the newly-purchased estate, and that he himself had left the house in question, and had gone to reside somewhere in the neighbourhood, with his eldest son.

There is also evidence of his actually intending, in process of time, to build a new house; and if he had done so, the new house would have been the place of his residence, and not the former house. The house in question was left and shut up; and from these facts I am asked to infer that the character of the property has been altered, and that the plaintiff is not entitled to the protection which the Court actually affords. The tenant for life succeeded to the property very soon after the settlement, the author having died in 1819. The son then proceeded to pull down the house.

It appears to me he had no more right to pull down that house than he had to pull down any other man's house. He had the use of the house for life; and though that be the case he is not of necessity bound to live there; far less is he entitled to pull it down: another person might like to live there. But whatever benefit might arise from this house, it was not his to pull down: he was only tenant for life; and, being only tenant for life, the consequence is, that he could acquire no such right from that. And it cannot be argued that because the house was pulled down by himself, he has a right in consequence to go on and pull down the trees.

Now I do not see anything in the author of the settlement's intention, which ought to withdraw from this property the protection which this Court affords as against an act of equitable waste. There may be evidence of his not being about to live there: but there is no evidence to carry the matter further. It is not residence that gives protection: it is the nature of the property. Therefore, if the house had not been pulled down, it would have been protected; and there is nothing to be inferred from the act of the settlor that he intended to alter the property: the utmost is that he did not mean to reside there himself. Consequently the defendant has no right to cut down the trees, which, it is admitted,

were left standing from an early period. I think, therefore, that the Vice Chancellor was entirely right, and that this motion must be refused, with costs.

K. BRUCE, V.C. Feb. 20; March 5. } STIKEMAN *v.* DAWSON.

Infant—Fraud—Railway Shares.

Doctrine as to the liability of persons after attaining their majority, in respect of dealings during infancy, in which they had been silent as to their age.

A broker sold railway shares, registered in the name of B, to C, and delivered to C. the certificates for the shares, and a transfer-deed signed by B; and C. paid to the broker the purchase-money for the shares. On an application by C. at the company's office to register the shares, he was informed that it could not be done, in consequence of a notice having been given to the company not to register the shares, on the ground that B, at the date of the transfer, was an infant. A bill was filed by C. against the broker and B; stating that B. was of age at the date of the transfer, and that he had held himself out to the world as being of age, and that C. had considered B. to be, and had held him out as being, of age; and praying for a reference to inquire whether B. was of age at the time of the transfer; and that, if it should appear that he was an infant, he might be ordered to assign the shares on the ground of fraud; and that the broker also might be answerable. The broker, by his answer, stated that he believed B. to be of age at the time. B. denied that he had ever held himself out as being of age. It appeared that B. was an infant at the date of the transfer, and that the purchase-money had been retained by the broker in respect of a debt alleged to be due to him from B, in respect of dealings in shares during B's infancy:—Held, that C, on this state of facts and these pleadings, had no remedy against the broker or B.

Previously to June 1842, forty-five quarter shares in the Leeds and Manchester Railway Company were registered in the name of John Kiddell Dawson, who was then residing at Liverpool.

In June 1842, Messrs. Middleton & Barber, sharebrokers, in Liverpool, instructed Messrs. Ewart & Bell, sharebrokers in London, their London agents, to sell for them forty-five Leeds and Manchester quarter shares. Accordingly, on the 7th of June, Messrs. Ewart & Bell sold these shares to Messrs. Stikeman & Barry, sharebrokers in London, on account of Mr. Hoole. The purchase-money for the shares was, shortly afterwards, paid to Messrs. Middleton & Barber, and the certificates of the shares and a transfer deed, dated the 14th of June 1842, and signed by J. K. Dawson, were delivered to Messrs. Stikeman & Barry.

In September 1842, the secretary of the company, in answer to an application to register the shares in the name of Mr. Hoole, informed Mr. Hoole that a notice had been sent to the office by Mr. John Dawson, the father of J. K. Dawson, desiring that the shares should not be registered, on the ground that, at the date of the alleged transfer, J. K. Dawson was under age, and that, in consequence of such notice the shares could not be registered.

The bill in the suit was filed by Messrs. Stikeman & Barry against Mr. John Dawson, Mr. J. K. Dawson, and Messrs. Middleton & Barber, in respect of the above transaction.

The bill stated that Messrs. Stikeman & Barry had repaid to Mr. Hoole the sums paid by him for the shares, and that he had assigned to them all his interest in the shares. The bill also stated that Messrs. Stikeman & Dawson had brought an action against Messrs. Middleton & Barber in respect of the shares, but that they had withdrawn it, in consequence of a doubt whether Messrs. Middleton & Barber were solvent.

As regards J. K. Dawson, the case stated by the bill was as follows:—That J. K. Dawson pretended that he was an infant at the date of the transfer. The bill charged the contrary, and that he was of age at the date of the transfer deed: and that for a considerable time before the date of the transfer, he had entered into large speculations in railway shares, and that in such dealings he had held himself out to the world as being of full age, and that, from his appearance and

conduct, he was generally considered at Liverpool and elsewhere to be of full age, and capable of attending to business.

As regards Messrs. Middleton & Barber the case stated by the bill was as follows:—It charged that Messrs. Middleton & Barber had, previously to the date of the transfer-deed, acted as agents to J. K. Dawson; that they considered him to be, and had held him out as being, of full age, and capable of contracting for the purchase and sale of shares.

As regards J. Dawson the bill stated that the shares had been purchased by him, and registered by him in the name of his son, in order to get rid of all liability in respect of them; that J. K. Dawson had previously to the date of the transfer-deed been treated by his father as if he were of full age; that J. Dawson claimed an interest in the shares, and that he combined with J. K. Dawson in seeking to deprive the plaintiffs of all benefit in respect of them.

It was also stated that J. K. Dawson had brought an action against the plaintiffs for the certificates; and that sixteen new shares had been allotted to J. K. Dawson in respect of the forty-five shares. It appeared that the purchase-money for the shares had been retained by Messrs. Middleton & Barber, for a debt alleged to be due to them from J. K. Dawson in respect of his dealings with them during his infancy.

The bill prayed that it might be referred to the Master to inquire whether J. K. Dawson was an infant at the date of the transfer; that, if it should appear that he was an infant at such date, it might be declared that his conduct was fraudulent; and, also that, by his acquiescence in the transfer after attaining his majority, he was bound by it; and that he might be decreed to make an effectual transfer to the plaintiffs. The bill also prayed that it might be declared that Messrs. Middleton & Barber had committed a fraud, and that they might place the plaintiffs in the same position as if the shares had been sold to them, and the transfer had been valid.

The plaintiffs did not enter into any evidence. The facts as to the sale of the shares, payment of the purchase-money, and refusal of the secretary to register the shares, in consequence of a notice that J. K. Dawson was an infant, were admitted.

Messrs. Middleton & Barber, by their answer, stated that they had acted as share-brokers on account of J. K. Dawson; that, in such transactions, they considered that he was of age; that he had the appearance of being a man of twenty-two or twenty-three years of age; that, having no doubt that he he was of age, they had not spoken to any person about his age; and that they believed he was of age during the above transactions.

Mr. Dawson and his son J. K. Dawson put in a joint answer. Mr. Dawson, the father, denied the charges brought against him. J. K. Dawson stated that his father was a wine-merchant at Liverpool; that, in July 1841, being twenty years old, he was cash-keeper to his father, and had controul over the cash; that about that time he had become acquainted with one Surridge, to whom he had lent money taken from the cash in his custody belonging to his father; that, in March 1843, Surridge owed him upwards of 200*l.*; that at Surridge's he met with one Cobb, a clerk in the employment of Messrs. Middleton & Barber, and also Mr. Middleton; that from his conversations with Cobb and Middleton as to making money by speculations in railway shares, and from wishing to replace the money taken from his father, and lent to Surridge, he was induced to employ Messrs. Middleton & Barber to buy and sell shares for him; that all the dealings with Middleton & Barber as to the shares took place at the office of the Surridges. J. K. Dawson also stated that Middleton had been informed, and well knew, that he, J. K. Dawson, was under age; that some time in June 1842, Middleton & Barber informed him that he was indebted to them in a considerable sum, and pressed him for payment, and that he agreed to transfer to them the shares which he was then possessed of (including the forty-five shares in question); and that he executed a transfer of these forty-five shares, which transfer had been prepared by them, and in which the name of the purchaser and the dates were left in blank. J. K. Dawson then denied that he had held himself out as being of full age during these transactions; that it was notorious that he was under age; and that he looked younger than he was.

It was proved in evidence on the part c

J. K. Dawson that he came of age on the 14th of September 1842. Some evidence was also entered into as to the general appearance and manners of J. K. Dawson. Miss Kiddell, a relation, stated, that previously to 1843, the general appearance, manner, and conduct of J. K. Dawson were those of a person younger than he really was. Mr. Rodick gave the following testimony: —"I was acquainted with J. K. Dawson, and frequently saw him in the year 1842. I never had any dealings or transactions with him during any part of that year. I knew the said defendant J. K. Dawson by means of his visiting at my house, and associating with my sons and daughters, and by these means I knew him well. I never knew or was acquainted with his real age: he associated with my two eldest sons, the eldest of whom was twenty-three in the month of August last, and the other twenty-two years of age in the month of July last; and I considered the said defendant J. K. Dawson their junior from his general appearance and manner. The general appearance of the said J. K. Dawson during such part of the year 1842 as I was acquainted with him was boyish, and his manner and conduct childish and frivolous. I do not know what the real age of the defendant J. K. Dawson was in the year 1842, and I do not know now what his age was; and I therefore cannot say whether he looked in any degree older or younger than he really was, nor whether his manner and conduct were those of a person older or younger than the said defendant, J. K. Dawson, really was. I do not know whether, at any time, in the year 1842, J. K. Dawson was considered to be under the age of twenty-one, except that I considered him to be in the year 1842 of the age of sixteen years, judging from his general appearance and manners, and from his being a mere boy when I first knew him."

In the course of the argument his Honour asked whether any objection was intended to be taken in consequence of Mr. Hoole not having been made a party to the suit, and was answered in the negative.

Mr. Wigram and *Mr. Malins*, for the plaintiffs, cited,—

Eyre v. *Nicholls*, 2 Eq. Cas. Abr. 488.
Savage v. *Foster*, 9 Mod. 35.
Watts v. *Creswell*, 9 Vin. Abr. 415.
Earl of Buckingham v. *Drury*, 3 Bro. P.C. 492.
Lord Teynham v. *Webb*, 2 Ves. sen. 198.
Beckett v. *Cordley*, 1 Bro. C.C. 358.
Clarke v. *Cobley*, 2 Cox, 173.
Cory v. *Gertcken*, 2 Madd. 40.
Overton v. *Bannister*, 3 Hare, 503.

Mr. Bacon and *Mr. Eddis*, for the Dawsons, cited *Ex parte Watson* (1).

Mr. Russell and *Mr. John Baily*, for Messrs. Middleton & Barber.

Knight Bruce, V.C.—In this case, if any of the defendants had objected, at the hearing, to the frame of the suit, as defective in point of parties, it is very possible I should have acceded to the objection upon the ground of the absence of Mr. Hoole from the record. But that course was not taken, and I did not consider it incumbent upon the Court to decline to hear the cause in its present state.

It may be convenient to consider it, in the first place, as a suit between the plaintiffs and Messrs. Middleton & Barber. In that respect what decree it would have been right to make if the bill had alleged that, at or before the time when the purchase-money was paid, they were cognizant of the infancy of J. K. Dawson, it is not necessary for me to intimate any opinion, for the bill does not so allege.

[His Honour then read the charges in the bill as to J. K. Dawson and Messrs. Middleton & Barber, the effect of which has been given in the statement of the case; and also a part of the answer of Messrs. Middleton & Barber, the effect of which has also been stated.]

I must, I think, dismiss the bill as against Mr. Middleton and Mr. Barber. The plaintiffs' counsel at the bar, indeed, considered, in effect, that it ought to be done. I do so, however, without prejudice to any action, or any other suit, and without intimating any opinion how far, or whether they are liable at law, or may be rendered liable at law or in equity, to the plaintiffs or Mr. Hoole, except that I may perhaps not improperly say thus much,—that, if it

(1) 16 Ves. 265.

shall hereafter be proved against Messrs. Middleton & Barber, that, before they instructed Messrs. Ewart & Bell to sell the shares in question, or before the shares had been sold to Mr. Hoole, they were aware or had been informed of Mr. J. K. Dawson's infancy, their title to retain the purchase-money, if not otherwise doubtful, may not be considered by any means clear. I should not have thought it right to give them any costs had not the bill contained a suggestion against their pecuniary circumstances. As it is, I give them 10*l.* costs, and no more.

The main question is, whether the plaintiffs are entitled to equitable relief against both or either of the other defendants; and, upon this, it may be not quite superfluous to be satisfied, first, whether the father's conduct has in any respect been fraudulent or unfair.

[His Honour then read the charges in the bill relating to Mr. Dawson, the effect of which has been given in the statement of the case.]

I have considered these charges, but I have also considered the father's answer and the evidence; and I am of opinion that it is not established, and that I ought not to suspect that the father's conduct has been in any respect fraudulent or unfair. By saying this, however, I do not mean to intimate any opinion whether the shares were purchased by the son with the father's money, or whether the father is entitled to follow any part of the property: that point I leave now untouched.

Assuming, for the present that the shares were not so purchased, and that he is not so entitled, it must next be recollected that it is proved (as between the plaintiffs and the Dawsons) that the son did not attain his majority until some time in September 1842—until some time after Mr. Hoole's purchase-money had been received by Messrs. Middleton & Barber, and Mr. Hoole had received the instrument of transfer with the blanks supplied. It has not been contended at the bar for the plaintiffs, that, on the ground of contract, or otherwise than on the ground of fraud, the title of the younger Dawson to the shares in question can be affected in this suit; for, although something was said of confirmation or acquiescence, not any point of the kind was pleaded or pressed; nor was it, on the materials before the Court, capable of being successfully made. Nor, on the part of the Dawsons, has it been contended that the frame of the bill excludes the plaintiffs from relief against the son on the ground of fraud, supposing fraud to be by his answer or otherwise proved against him; and, without deciding, I will assume the frame of the bill not to do so. I assume, therefore, that, if the bill does not allege substantially, that on or before June 1842 he was aware of his true age, and aware of his civil disability and his privilege as a minor with respect to a contract of the kind in question, it was unnecessary that the bill should do so. The plaintiffs' counsel have, I repeat, in argument put, and properly put, their case for relief against J. K. Dawson on the ground of fraud and fraud only.

Did he, then, during his minority, commit, in respect of the matter in question, a fraud —a fraud of such a nature as to render him necessarily now amenable to this jurisdiction, and so as to entitle the plaintiffs to relief on the ground of fraud? This is the simple point between him and the plaintiffs. Now, the fraud imputed to him is not that of making a false assertion or any express misrepresentation at all; he made none. The fraud imputed to him is merely that he did not disclose the fact of his minority to Messrs. Middleton & Barber—I say, to them—because he had not any dealings with the plaintiffs, or with Mr. Hoole, except so far, if at all, as the dealings or communications of Messrs. Ewart & Bell and Messrs. Middleton & Barber can be considered in any sense as his dealings and communications; nor had he any dealings or communications with Messrs. Ewart & Bell, except so far, if at all, as the dealings and communications of Messrs. Middleton & Barber can be considered in any sense as his dealings and communications. If J. K. Dawson committed any fraud, otherwise than upon his father, it must be taken to have been a fraud upon Messrs. Middleton & Barber; as the state of the record precludes us from considering them as accomplices of J. K. Dawson in a fraud upon the plaintiffs and Mr. Hoole; nor do I wish to be understood as suggesting they were. Still, frauds and misrepresentations, if any, upon Messrs. Middleton & Barber, may have been of such a nature, and at-

tended by such consequences, as to give the plaintiffs a title to complain of it effectually against the defendant. Now, although the imputed fraud is of not disclosing the fact of his minority, yet it has been said by the plaintiffs' counsel that a fraudulent suppression or concealment may be, and sometimes is, equivalent to a false assertion fraudulently made in express terms. This I am far from denying. I accede to the proposition. But they say, moreover, in effect, that, in the case before the Court, as to the dealings between J. K. Dawson and Messrs. Middleton & Barber, it was the duty of J. K. Dawson and incumbent on him to apprise them of his minority; that he did not do so; and that, from the nature of the dealings, his omission to do so was equivalent to a denial by him of the fact of minority; and that it was a fraud on his part, for which, notwithstanding his minority at the time, he was answerable in equity after his majority. These are, in truth, the propositions to be tried between him and the plaintiffs, who, I assume, without deciding, are the proper parties to raise the point before the Court.

For the purpose of considering them, and coming to a conclusion upon them, I have read attentively the pleadings and evidence, and have examined various authorities, including all those cited at the bar, and the case of *Eyre* v. *Nicholls* (called *Evroy* v. *Nicholas* in the registrar's book). Now, first, the proposition that the dealings between J. K. Dawson and Messrs. Middleton & Barber were not of such a nature as to be capable of binding the infant without fraud on his part, is, I suppose, indisputably true. But, secondly, was it his duty, as the word is understood in a court of justice, not to enter upon these dealings without mentioning to them his true age? Without affirming that it was proper, I will, for the present, assume so. It seems to involve an assumption not only that the probable or certain fact of his minority, and likewise its material bearing upon the question of his responsibility, were known to himself; but, moreover, the brokers' ignorance of his minority. Such, then, being considered to have been his duty, did he commit any breach of it? Is such a breach proved against him? The plaintiffs must be understood as contending that it is proved against him on the ground (as they must be taken to insist) that the burthen of proof in this matter lies upon him. But did the burthen of proof as to this lie upon him? Generally, it is true that the burthen of proof lies upon the party who affirms, not upon the party who denies. The rule is not unqualified—is not without exceptions. Neither criminality nor fraud is to be presumed; and, though the case of *Williams* v. *the East India Company* (2), and various others that have preceded and followed it may not go the whole of the way to establish the point of burthen of proof against the plaintiffs, they may be thought not to be without a bearing upon the subject. The charge against J. K. Dawson is of the fraudulent omission to make any disclosure. I am not aware of any affirmative evidence against him in support of that charge. Assuming it not to be incumbent upon the plaintiffs to advance material and very strong testimony in support of it, were they entitled to abstain altogether from adducing any evidence? It is true that it may be said that a communication, if any, from J. K. Dawson to the brokers, is a fact more peculiarly within his own knowledge, and of which the burthen of proof is, by a general rule, therefore cast upon him; and this may be so, but the fact itself, as already intimated, and which indeed is obvious, is immaterial, unless it be taken that, independently of any communication from him, the brokers neither knew nor had notice that he was a minor. The plaintiffs have, indeed, assumed throughout, that, independently of any communication from J. K. Dawson, the brokers did not know of his minority, and had not notice of such minority. But were they entitled to assume it? Is their ignorance of that minority to be presumed, unless the contrary be shewn? Assuming it, however, possible that there may be transactions in which the mere fact of a young man engaging himself may justify a belief in those with whom he deals that he is not a minor, I think the case is not so with regard to transactions of the nature —I ought not, perhaps, to say the discreditable nature—which existed between the

(2) 3 East, 192.

brokers in question and their unlucky customer.

[His Honour here read at length the passages in the answer of J. K. Dawson, the effect of which has been given in the statement of the case, and also the evidence of Miss Kiddell and Mr. Rodick.]

Why is the Court to conclude that the brokers, under the circumstances of such a case as this, did not know or believe the truth? Nor, perhaps, will it be out of place here to refer to the judgment of a distinguished Judge in a well-known criminal case: it is the language of Lord Tenterden, who says, "A presumption of any fact is properly an inferring of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred, without premises that will warrant the inference; but, if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given. The man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but, when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but, in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected"—*The King* v. *Burdett* (3). Now, treating Lord Tenterden's observations as applicable to this case, in which, though civil, the charge is, that the minor was guilty of a fraud, it may be asked, whether the facts proved between him and the plaintiffs do not, in the absence of explanation or contradiction, warrant a reasonable and just conclusion that the brokers were not unaware of the minority of their youthful-looking townsman, whom they were in the daily habit of dealing with —the son, moreover, of a merchant in the town?

As, however, it may be questionable whether it ought to be inferred between these parties that, during the transactions in question, Messrs. Middleton & Barber thought J. K. Dawson under age, or had notice of his minority, I proceed to consider the plaintiffs' last position, namely, that on the assumption of the young man's acquaintance with his own minority, and the law on the subject, and of the brokers' belief that he was not a minor, and the omission to communicate that fact to them, there was a fraud on his part, in consequence of which he became or was after his majority and is answerable in a court of equity. This is, as I consider, a question of importance and general interest. The civil law defines "dolum malum" to be "omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum adhibitam" (4). Then (the language is that of Ulpian), "Item in causæ cognitione versari, Labeo ait, ne in pupillum de dolo detur actio, nisi forte nomine hereditario conveniatur. Ego arbitror, et ex suo dolo conveniendum, si proximus pubertati est, maxime si locupletior ex hoc factus est" (5). And the Digest proceeds in these words:—"Quid enim, si impetraverit à procuratore petitoris, ut ab eo absolveretur; vel si, de tutore mentitus, pecuniam acceperit; vel alia similia admiserit, quæ non magnam machinationem exigunt?" (6). Then Ulpian: "Sed et ex dolo tutoris, si factus est locupletior, puto in eum dandam

(3) 4 B. & Ald. 161.
(4) Dig. lib. iv. tit. 3, l. 2.
(5) Ibid. l. 13.
(6) Ibid. l. 14.

actionem: sicut exceptio datur" (7). And, unquestionably, it is the law of England, that an infant, however generally for his own sake protected by incapacity to bind himself by contract, may be "doli capax" in a civil sense, and for civil purposes, in the view of a court of equity (though, I believe, only when "pubertati proximus" is alleged), and not, I suppose, at so early an age as for criminal purposes, and may, therefore, commit a fraud, for the consequences of which he may be made after his majority civilly answerable in equity. I am now speaking of cases in which infants are liable only, or who, if adults, are suable at law only, in respect of acts done during infancy; but, as far as equity is concerned, the practical application of the rule or doctrine to which I have been referring must not seldom, I conceive, be a matter of much difficulty or delicacy; and I agree with a learned author who says, that, "In what cases in particular, courts of equity will thus exert themselves it is not easy to determine, nor indeed is the jurisdiction of equity the only jurisdiction where difficulties on this subject have arisen or may arise. Courts of law have not been free from them." The capacity of infants to commit crime,—their punishment for criminal offences,—and their liability civilly for various wrongs, not connected in any sense with contracts, as, for instance, battery and slander, to say nothing of the clear right in some circumstances to maintain trover against them, are of universal recognition. But questions which have been considered not free from difficulty have arisen whether, or how far, persons are civilly liable at law for such acts as, if they were the acts of adults, would be wrong, if done during infancy; supposing them to be connected with contracts. The case of embezzlement by a servant or apprentice, and a case in *Rolle's Abridgment* (8), with respect to an infant master of a ship, are instances of this kind, in which the objection of minority did not prevail; while, on the other hand, there are cases—for example the case of *Johnson* v. *Pye* (9), where it was ruled that an action of deceit could not lie by the false assertion of the defendant, when an infant, that he was of age—the case mentioned in *Johnson* v. *Pye* of the assertion of an infant that a false jewel, not belonging to him, was a diamond and his own—the case of the infant innkeeper, in *Rolle's Abridgment;* and, in modern times, a case mentioned to me by Mr. Lee, of *Jennings* v. *Rundall* (10),—in which an objection of minority has prevailed. A case also in which an infant was plaintiff may be mentioned, as tending much in the same direction—the plaintiff having recovered, though her conduct, if not fraudulent, was very near it or like it. [His Honour then read the case of *Scroggan* v. *Stewardson*, from 3 *Keb.* 369, and the same case reported as *Anna Secrogham* v. *Stuartson*, from 4 *Bac. Abr.* 367, 7th edit.]

Now, in those instances in which minors have succeeded at law, could there have been any interposition against them in equity,—a jurisdiction, generally, at least equally considerate with courts of law in favour of infants? Fraud certainly is odious, and is to be repressed; but neither is protection to be withheld from the imbecility of youth. Is not allowance to be made for its exposure and obnoxiousness to influence, temptation, and seduction? For, especially in case of legal knowledge, very young men may be seduced into the commission of fraud. Lord Eldon, in *Jackson* v. *Hobhouse* (11), with reference to the case of a married woman, who may also commit fraud, glances at the possibility of the husband compelling his wife to join him in a fraud; and may not some consideration be had for a boy taken in the toils of a designing and experienced man of mature age? By the last sentence, I do not wish to be understood as deciding or as referring to the present matter, as to which, though I do not say that the whole account given, whether accurate or inaccurate, by the young man in his account of the commencement and progress and nature of the connexion between him and Middleton & Barber, is in evidence against the plaintiffs; yet I cannot but observe, that the bill might have been amended after the answer, and that, with such an answer before the plaintiffs, they have only adduced the evidence which they have, if they have adduced any evidence.

(7) Dig. lib. l. 15.
(8) 1 Roll. Abr. 530.
(9) Sid. 258; 1 Lev. 169.
(10) 8 Term Rep. 335.
(11) 2 Mer. 483.

The story told by the answer is, in substance, that this young man had unhappily committed himself so far as to abuse the confidence of his father, to whom he was cashkeeper, and to misapply some sums, not of inconsiderable amount, belonging to his father. The son was anxious to make good that loss, and in this way:—Having met Mr. Cobb, clerk of Middleton & Barber, and afterwards Mr. Middleton, at the office of Mr. Surridge, the young man was struck by Mr. Cobb representing he had heard of the probability of large profits being derived from gambling (or, what is the same thing, speculating, whichever it ought to be called) in shares in public undertakings, and, upon these representations, with a view to deliver himself from his difficulties, he engaged in a series of transactions, which ended in a manner that scarcely required inspiration to foretel. If this statement is substantially true, or even substantially true so far as it agrees with Messrs. Middleton & Barber's representation of the matter: if Mr. Rodick's description of the young man's personal appearance is substantially accurate, and if Messrs. Middleton & Barber (knowing, as it is probable they did know, that the boy had a father living at Liverpool) allowed him to engage in such dealings, and to contract the debt, without making a communication to the father, or asking a question of him (and no such communication appears to have been made), it may be difficult to account satisfactorily for the conduct of Middleton & Barber; and I think it is as difficult to think it likely that they should have been defrauded by the lad. If the brokers and their adventurous young principal were not on equal terms, there appears little difficulty in the way of saying who was probably the weaker party. Apart, however, from any peculiarity of circumstances, the plaintiffs seem substantially to contend for not less than this general proposition, that, if a minor deals, in a matter of contract, with a person who, having no notice of his minority, does, without any representation to him on the subject, believe the minor to be of full age, the minor is, after majority, at least answerable in equity to that person for the contract or the consequences, or is liable to be compelled to restore him to his original position, not referring, as I do not refer, to any case where the law permits infants to contract, or to any case where the point is purely legal. I am not aware that such proposition is founded on principle, or supported by the authorities which bind the Court. It seems to me full of danger and evil, as was said at law in a case already mentioned, where it was held, that an action of deceit would not lie on the assertion of a minor that he was of full age; and there seems a great deal of practical good sense as well as good law in it. *Johnson* v. *Pye* is thus—[His Honour then read the report of *Johnson* v. *Pye*, from *Sid.* 258]. The case of *Clarke* v. *Cobley* was, I think, decided correctly; and I do not doubt that the decisions in *Watts* v. *Creswell* and *Savage* v. *Foster* were required by the peculiar circumstances of those cases. In the latter case, Mr. and Mrs. Foster might have barred their title by a fine; and it was, I suppose, considered, that she committed a fraud not under the husband's influence. In *Watts* v. *Creswell*, the minor must be supposed to be considered as not having acted under his father's controul; and his conduct seems to have been of the most gross description; it was a grossly dishonest case; so gross as, perhaps, to have been obnoxious to criminal proceedings. Lord Cowper says, in *Watts* v. *Creswell*, "If he was made a party to the deed, and sealed it, yet that would not bind him." And here, perhaps, it may not be quite out of place to remember Lord Hardwicke's remarks on the difference between the disability of infants and married women, which he made in *Hearle* v. *Greenbank* (12), and also the case of *Eyre* v. *Nicholls*, decided by Lord King. I may, perhaps, be allowed to say, that the report in the 2nd *Equity Cases Abridged* does not appear satisfactory. I venture to think that that case, as there stated, affords no sufficient foundation for the decree that was made; and I may possibly be permitted to say the same of the case as it appears in the *Registrar's Book*, which, however, does not give the pleadings, nor shew what the evidence was; nor, probably, without an examination of the proofs and pleadings, is it possible to form a just opinion of Lord King's decree, which gave no costs. I collect that the lease was made three or four

(12) 3 Atk. 695. See p. 712.

years before the defendant's majority; and that his age had not been misrepresented to the plaintiff, but was known from the beginning. Perhaps it might have been true that the defendant had fraudulently represented himself to the plaintiff as able to grant the lease, or that the defendant, at or after his majority, had received a fine or its value. Upon the decision in *Cory* v. *Gertcken*, and the dictum in *Overton* v. *Bannister*, by two Judges of great weight and consideration, I think it not necessary to express, and I do not intimate, any opinion. Each of them is distinguishable from the present case. By neither of them, nor by the cases of *Ex parte Watson* and *Belton* v. *Hodges* (13), is it, I conceive, rendered incumbent on me to give to the present plaintiffs a decree against J. K. Dawson. As reported by Mr. Vesey, "ex relatione," the case of *Ex parte Watson* is not very well done, though probably not inaccurately. I have read the original affidavits on which the petition was heard. By declining to supersede the commission, Lord Eldon did not prevent the petitioner from disputing its validity at law; nor does there appear reason to suppose that Lord Eldon was asked, or would have consented, to interfere against the petitioner for the purpose of enforcing against him submission to the bankruptcy. *Goode* v. *Harrison* (14) may be thought a remarkable case; but, if not opposing, I am not sure it does not support, the plaintiffs' contention against the younger Dawson. If the action in that case had been by an unpaid vendor for goods supplied before the majority, and not for goods supplied more than six months after the majority, could there have been judgment against Bennion at law? And if there could not, could there have been any title to relief against him in equity? In my opinion, I repeat, the notion of charging a man in equity, after his majority, on a purchase, or sale, or contract, made during his minority, merely because, without any false assertion by him, the other party believes he is not a minor, and believes it on the ground that adults themselves can only have such dealings, is contrary to principle, and is of dangerous consequence, and is not established by authority. Laws cannot vindicate every deflexion from propriety; and it must be preferable that men of full ages, in or out of trade, should sometimes suffer for acts of imprudence, than that there should be given an obvious facility and plain encouragement to minors to be their own destroyers, and to others to make them their prey, which would be afforded by the rule, that mutual silence, with an appearance of manhood, should expose a boy, on the ground of fraud, to be fixed after his majority with the consequence of the most ruinous, most rash, and foolish conduct, and the liability to restore money wasted in a childish extravagance. In the cause now before the Court, J. K. Dawson's legal title is sought to be taken from him, on the ground of a sale during his infancy, in respect of which he has not received the purchase-money. There seems to be reason to believe that the purchase-money went into the hands of Middleton & Barber, towards satisfying a pecuniary demand of great amount which they alleged to have against him, but, in respect of which, it is possible, if not certain, that he could not have been sued; and any relief against Middleton & Barber cannot be given in this suit, constituted as it is. Their right was, and is, to be dismissed from it.

Upon the whole, if it be assumed that from the beginning to the end of the year 1842 the plaintiffs, Mr. Hoole and Ewart & Bell believed that J. K. Dawson was of full age (and there is no reason to suspect the contrary), the case is still not one in which, either on principle or on authority, the Court ought, in my opinion, to pronounce that fraud has been committed by him, in respect of which relief in equity should be given against him. It follows, that I must think it unnecessary, for the purposes of the question of relief, to decide whether the father has any lien on the shares or any interest in them. Without determining that point, I conceive the bill ought to be dismissed against the Dawsons; with costs as to the father; without costs as to the son; and without prejudice to any action or any other suit.

(13) 9 Bing. 365; s. c. 2 Law J. Rep. (N.S.) C.P. 19.

(14) 5 B. & Ald. 147.

WIGRAM, V.C.
Dec. 23;
Jan. 11.
CROCKETT v. CROCKETT.

Will—Construction—Joint-tenancy.

The testator, by his will, directed that all his property should be at the disposal of his wife for herself and her children:—Held, that the wife and children took interests as joint-tenants in possession.

This was a suit by the infant children of John Crockett, the testator in the cause, against his widow and administratrix, for an administration of the estate, and a declaration of the rights of the widow and children under the will.

See the case reported on the hearing, *ante*, 11 *Law J. Rep.* (N.S.) Chanc. 279, s. c. 1 *Hare*, 451.

One of the children, having come of age since the decree, now presented his petition, praying to have an aliquot share of the fund in court paid over to him as joint tenant with the widow and the other three surviving children of the testator.

Mr. Goldsmid, for the petitioner, and *Mr. Romilly* and *Mr. R. Palmer*, for the infant children, contended that, under the will, the widow and children were interested in the fund in joint-tenancy.

Mr. Walker and *Mr. Bush*, for the widow, contended that the intention of the testator, to be collected from the terms of the will, was, that the widow should have a power of appointing the fund among herself and the children in such shares and proportions as she should think fit.

WIGRAM, V.C.—The construction contended for by the defendant, if admitted, would have the effect of depriving the children of the benefit of the decree made in their favour at the hearing; if such were the true construction, the party ought to have appealed from the decision made at the hearing, in order to have the benefit of it. The construction contended for by the children was, that the will created a joint-tenancy. Attending to the legal consequence of that construction, I feel morally satisfied that it does not carry out the testator's intention; and if I were at liberty to modify the words of the will, I should have little difficulty in doing so, in a manner conformable to what the testator himself, no doubt, intended. As, however, the words of the will do not enable me to bind the widow to a mere life interest, and as the decree gave the children an interest in possession, I can come to the only conclusion that the interests of the widow and children are as joint-tenants. The petitioner, therefore, will be entitled to a decree for his share, but the order made upon the hearing may be continued with reference to the widow and the infant children.

L.C.
1846.
Dec. 15, 16.
1847.
Jan. 11;
Feb. 9.
COOMBES v. RAMSAY.

Amendment of Bill — Orders of May 1845 — Statute 3 & 4 Will. 4. c. 94.—Appeal from Master.

Since the Orders of May 1845, all special applications for leave to amend a bill should be made, in the first instance, to the Master in rotation, and not to the Court except by way of appeal.

As a general rule, an appeal from the decision of the Master upon such an application will not be heard by the Lord Chancellor, although the act 3 & 4 Will. 4. c. 94. gives the right of appealing to the Lord Chancellor, Master of the Rolls, or Vice Chancellor, and the decision of either of those Judges is to be final.

The time for amending the bill, without special leave, expired in July 1846. Application for leave to amend had been made to the Master in November 1846, but the Master refused the application. The plaintiff then moved before the Vice Chancellor that he might be at liberty to amend his bill, but the motion was refused, with costs. He now renewed the application before the Lord Chancellor, by way of appeal.

Mr. Cooper and *Mr. Miller* appeared in support of the motion.

Mr. Spence, *Mr. Stinton*, and *Mr. Jervis*, for different defendants, raised a preliminary objection, and contended that since the

Orders of May 1845, all applications for leave to amend were to be made, in the first instance, to the Master, under the 3 & 4 Will. 4. c. 94. ss. 13, 14, and that there was only one appeal from the Master's decision; and that as the plaintiff had already appealed to the Vice Chancellor from the Master, he was not entitled to carry the matter any further, and that, consequently, this application to the Lord Chancellor was irregular—*Christ's Hospital* v. *Grainger* (1).

Mr. Cooper and *Mr. Miller* relied upon *Lloyd* v. *Wait* (2) and *Smith* v. *Webster* (3), as shewing that the Master had no jurisdiction in this matter, and that the application to the Vice Chancellor was quite regular, and that they were entitled to appeal from his decision to the Lord Chancellor.

The Lord Chancellor said that he was not now at liberty to consider whether it would or would not be expedient that the practice should be such as was contended for on behalf of the defendants. The only question before him was, how far the practice of the Court had been changed by the rescinding of the Order upon which the decision in *Lloyd* v. *Wait* was founded, namely, the 13th Order of 1828 (4), which was annulled by the Orders of May 1845. Lord Lyndhurst, in *Christ's Hospital* v. *Grainger*, had expressed his opinion that all applications for leave to amend must now be made, in the first instance, to the Master. He (the Lord Chancellor) concurred in that opinion. The case of *Lloyd* v. *Wait* was no longer applicable, and this motion must be refused, with costs.

The plaintiff, shortly afterwards, again applied to the Master for leave to amend, which the Master again refused: and the plaintiff then made a similar application to the Lord Chancellor, by way of appeal from the decision of the Master.

It was contended, that the 13th section of the act (3 & 4 Will. 4. c. 94.) gave to a plaintiff the right of appealing from the Master, either to the Vice Chancellor, the Master of the Rolls, or to the Lord Chancellor: that as there was no appeal from the Judge who should decide, the plaintiff was entitled to bring the matter before the Lord Chancellor immediately, without going before either of the other Judges in the first instance.

The Lord Chancellor said, that after the act of 3 & 4 Will. 4. the Vice Chancellors' Act (5 Vict. c. 5.) was passed; under which either of the Vice Chancellors might hear all such applications as this, while there were many matters which the Lord Chancellor alone could hear. It was, therefore, very inexpedient that such a question as this should be brought before him in the first instance; and his Lordship refused to hear it.

The application was afterwards made to the Vice Chancellor of England, and refused.

(1) 1 Phil. 634; s. c. 15 Law J. Rep. (N.S.) Chans. 145.

(2) 4 Myl. & Cr. 257.

(3) 3 Ibid. 244.

(4) Ord. Can. 8.

M.R.
Feb. 24; March 23. } ROBERTSON v. SKELTON.

Purchase — Order Nisi to confirm — Order to confirm absolutely—Special or of Course—Costs.

A purchaser, who was not in a situation to comply with the conditions of sale, obtained an order nisi *to confirm the Master's report, finding him the purchaser of certain estates sold by order of the Court, but having delayed to confirm the report absolutely, the plaintiffs moved, on notice to the purchaser, to confirm the same absolutely:—Held, the motion being of course, and not requiring notice, that the application must be refused, and with costs.*

Mr. Hubback moved, on behalf of the plaintiffs, that the Master's report, of the 4th of November 1846, finding H. H. to be the purchaser of certain estates, sold in the month of July 1846, under the orders of the Court, might be confirmed absolutely, and that the purchaser might be ordered to

pay the costs of the motion. The purchaser, in December 1846, had obtained an order *nisi* to confirm the report, but had taken no proceedings to confirm the same absolutely.

Mr. Steere, contrà, for the purchaser, contended, that the motion was one of course, and ought to have been made without notice to the purchaser, and cited—

Chillingworth v. *Chillingworth*, 1 Sim. 291; s. c. as *Anonymous*, 5 Law J. Rep. Chanc. 147.

Lidbetter v. *Smith*, 5 Beav. 377.

Roberts v. *Williams*, 2 Hare, 151; s. c. 12 Law J. Rep. (N.S.) Chanc. 255.

But even if the motion should be held by the Court not to be of course, according to the practice of the Court, still there was a want of ordinary courtesy on the part of the plaintiffs, in not intimating to the purchaser the plaintiffs' intention to apply to the Court to absolutely confirm the Master's report.

The MASTER OF THE ROLLS said there seemed to be some doubt as to the proper course to be pursued in cases like the present, and he would make inquiry into the practice; the plaintiffs had, doubtless, a right to make the present application to the Court, if the purchaser declined to take any proceedings to confirm the order *nisi* already obtained by him; and the purchaser ought to give some reason for his not having proceeded to confirm the order *nisi* already obtained by him. There ought to have been a communication between the plaintiffs and purchaser previously to the service of the present notice of motion, inasmuch as its object was to take the matter out of the hands of the purchaser.

On the 23rd of March, *Mr. Hubback*, in renewing the motion, stated that he depended on the conditions of sale in this case, by which the purchaser was bound, and not so much on the general practice of the Court; and added, that if his client was in error, he had been misled by the information he had received from the registrar, and on that ground ought not to pay any costs, even if not successful.

The MASTER OF THE ROLLS, after obsering that the case of *Chillingworth* v. *Chillingworth* (1) was the only authority ar those cited that was applicable to tl before the Court, decided, that as the tiffs, according to the practice, migh proceeded to serve the order *nisi* a obtained, and confirm the same abs without notice, the motion must be r and, under the circumstances, with and the Master of the Rolls added, tl plaintiffs might get back such of the c they could, on completing the purcha he did not make that any part of his

(1) The following is a copy, from the reg book, of the case of Chillingworth v. Chillin made the 25th of April 1837, which was afte by the order of the Master of the Rolls, to counsel for the plaintiffs and the purch "Upon motion this day made into this C Mr. Girdlestone, jun., of counsel for the pl it was alleged, that by an order, dated tl of February 1824, it was ordered that th of Mr. Trower, one of the Masters of this dated the 9th of September 1823, wherob Price, on behalf of Margaret Price, was allo purchaser of the premises in this said repo tioned, comprised in lot No. 16, part of the in question in this cause, at the sum of 51 all the matters and things therein contained stand ratified and confirmed by the order, an and decree of this Court to be observed a formed by all parties thereto, according to tl and true meaning thereof, unless the plaint defendants, who were many in number, an remote from each other, their respective c court having notice thereof, should, withi days after such notice, shew unto the Cou cause to the contrary. That it appears, affidavit of James Taylor, that on the 23rd bruary 1824, he, the said James Taylor, citor for the plaintiffs in this cause, receive his clerk in court a copy of the said order the said 12th of February, and which he b was duly served on the said plaintiff's c court, by or on behalf of the said Margaret the purchaser; the words, 'served 25th F 1824,' being written thereon by the clerk o of the said James Taylor's clerk in court. T said Margaret Price neglecting to procure t order to be made absolute, the plaintiff o the office copy of the said order, and whi signed by one of the deputy registrars of thi and it appears by the affidavit of Charles Hi he did, on the 5th of February instant, ser Jackson, Mr. Smith, and Mr. Wainwrig clerks in court for all parties in this cass the said copy of the said order, dated the February 1824. That no cause has been against the said order, as by the registrar's cate appears. It is therefore prayed, that t order may be made absolute, which is accordingly."—Reg. Lib. A, 1826, fol. 925

V.C.
1846.
March 31;
April 1, 13, 14, 15, 16, 21, 22.
L.C.
1847.
April 16, 17, 22, 23, 28.

MOZLEY v. ALSTON.

Railway Companies Clauses Consolidation Act, 1845, *and Birmingham and Oxford Junction Railway Act — Construction — Railway Company—Retirement and Re-election of Directors—Pleading—Parties—Demurrer—Jurisdiction.*

A bill, by individual members of a railway company, impugning the title of a corporate officer to exercise corporate functions, and seeking to take the corporate seal and property out of his hands, will not be sustained.

Semble—*The proper course is at law by* quo warranto *or* mandamus.

To a bill, by four shareholders in a railway company against the directors and against the company, alleging that twelve out of the eighteen directors ought, at a certain time prescribed by the acts of parliament, to have balloted out one-third of their number, and to have elected new directors in their stead, and alleging that, by their refusal or failure so to do, the twelve recusant directors were all rendered incompetent to act, and ceased to be directors de facto, *and praying for an injunction to restrain them from voting or acting any longer as directors, and for a transfer of the corporate seal and funds to the six lawful directors; a general demurrer by the company for want of equity was allowed by the Lord Chancellor, reversing the decision of the Vice Chancellor of England.*

Where there is a common object, and the interests of all are identical, a bill may be sustained by individual shareholders of a company, on behalf of themselves and all other shareholders.

Taylor *v.* Salmon (1) *and* Wallworth *v.* Holt (2) *commented upon.*

Individual shareholders cannot sustain a bill in their own names alone respecting a matter common to all.

If the injury complained of is personal to themselves, contrà.

The principles laid down in Foss *v.* Harbottle (3) *approved.*

The bill was filed on the 17th of March 1847 by Charles Mozley, Josiah Jones, Thomas Dyson Hornby, and William Hall, describing themselves as holders of shares in the capital stock of the Birmingham and Oxford Junction Railway Company, and duly registered in respect of such shares, and having paid all the calls made upon them in respect thereof, against the eighteen directors of the Birmingham and Oxford Junction Railway Company, and also against the company. It stated, that by an act of the 9 & 10 Vict. (an act for making a railway from Birmingham to join the lines of the proposed Oxford and Rugby, and Oxford, Worcester and Wolverhampton Railways, and to be called the Birmingham and Oxford Railway), it was enacted, that the provisions of the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1845, in so far as the same were not modified by or inconsistent with the provisions thereinafter contained, should be incorporated with and form part of that act; and by the 3rd section the company was incorporated under the name of the Birmingham and Oxford Junction Railway Company; and by the 9th section it was enacted, that the number of directors should be twelve, and the qualification of a director should be the possession in his own right of twenty-five shares in the undertaking; and by the 10th section it was enacted, that it should be lawful for the company to increase or reduce the number of directors, provided that the increased number should not exceed eighteen, and that the reduced number should not be less than six; and by the 11th section it was enacted, that certain persons therein named should be the first directors of the company; and by the 12th section it was enacted, that the directors appointed by that act should continue in office until the first ordinary meeting to be held after the passing of that act, and that at such meeting the shareholders present, personally

(1) 4 Myl. & Cr. 134.
(2) Ibid. 619; s. c. 10 Law J. Rep. (N.S.) Chanc. 138.
(3) 2 Hare, 461.

or by proxy, might either continue in office the directors appointed by that act, or any number of them, or might elect a new body of directors or director to supply the places of such of them as should not be continued in office, the directors appointed by that act being eligible as members of such new body. By the 13th section it was enacted, "That at the first ordinary meeting to be held *in the year next after the year in which* such last-mentioned directors should have been appointed or elected, the shareholders present, personally or by proxy, should elect persons to supply the places of directors then retiring from office, agreeably to the provisions in the said Companies Clauses Consolidation Act contained, and that the several persons elected at any such meeting, being neither removed nor disqualified, nor having resigned, should continue to be directors until others were elected in their stead, in manner provided by the said Companies Clauses Consolidation Act;" and by the 14th section it was enacted, that a quorum of a meeting of directors should be five; and by the 16th section it was enacted, that the first ordinary meeting of the said company should be held *within six months after the passing of that act.*

By the 66th section of the Companies Clauses Consolidation Act(4), it was enacted, that the first general meeting of the shareholders of the company should be held within the prescribed time, or if no time were prescribed, *within one month after the passing of the special act*, and that the future general meetings should be held at the prescribed periods; and if no periods were prescribed, in the *months of February and August* in each year, or at such other stated periods as should be appointed for that purpose by an order of a general meeting; and that the meeting so appointed to be held as aforesaid should be called "an Ordinary Meeting;" and by the 83rd section it was enacted, that the directors appointed by the special act should, unless thereby otherwise provided, continue in office until the first ordinary meeting to be held *in the year next after that in which* the special act should have passed; and that at such meeting the shareholders present, personally or by proxy, might either continue in office the directors appointed by the spe or any number of them, or might new body of directors or director to the places of those not continued i the directors appointed by the spe being eligible as members of such nev and that at the first ordinary meetin held every year thereafter, the share present, personally or by proxy, elect persons to supply the places directors then retiring from office, ag to the provisions thereinafter contain that the several persons elected at a meeting, being neither removed n *qualified*, nor having resigned, shou *tinue to be directors until other elected in their stead* as thereinaft tioned; and by the 88th section enacted, that the directors appointed special act, *and continued in office a said*, or the directors elected to sup places of those retiring as aforesaid, subject to the provision thereinbef tained for increasing or reducing the of directors, retire from office at the ti in the proportions following, the ind to retire being in each instance det by ballot among the directors, unle should otherwise agree, (that is to *the end of the first year, after t election of directors*, the prescribed and if no number were prescribed o *of such directors to be determined b among themselves*, unless they shoul wise agree, should go out of office; a of the second year the prescribed and if no number were prescribed, of the remaining number of such d to be determined in like manner, sh out of office; at the end of the third y prescribed number, and if no numb prescribed the remainder of such d should go out of office; and that instance the places of the retiring d should be supplied by an equal nu qualified shareholders; and that at ordinary meeting, in every subseque the prescribed number, and if no were prescribed, one-third of the di being those who had been longest i should go out of office; and th places should be supplied in like but that every director so retiring fro might be re-elected immediately, o future time, and after such re-

(4) 8 & 9 Vict. c. 16.

should, with reference to the going out by rotation, be considered as a new director.

The royal assent was given to the Birmingham and Oxford Junction Railway Act on the 3rd of August 1846; and on the 30th of October 1846 the company held their first ordinary meeting under that act, at which meeting all the directors named in the act retired, and all the retiring directors were re-elected, except two, for whom two others were substituted.

In conformity with the provisions of the said Companies Clauses Consolidation Act, an ordinary meeting of the said Birmingham and Oxford Junction Railway Company was held on the 27th of February 1847, and the same was duly adjourned to the 13th of March 1847, at four o'clock in the afternoon. An extraordinary meeting of the said Birmingham and Oxford Junction Railway Company was also held at two o'clock in the afternoon, on the said 13th of March 1847, in pursuance of a special notice thereof duly given, for the purpose of considering the propriety of, and if so determined, for the purpose of taking the necessary steps at such meeting, for increasing the number of directors of the said company by the election, if so thought fit, of six new directors, in addition to the existing directors of the said company, and if so thought fit, of proceeding at such meeting to elect such new directors accordingly, and in case of such election, of determining the order of rotation in which such new directors should go out of office, and what number should be a quorum at meetings of the directors of the said company, and also for the purpose of considering the provisions of a bill intituled, "A proposed Bill for uniting the Birmingham and Oxford Junction Railway Company and the Birmingham, Wolverhampton and Dudley Railway Company into one company, and for authorizing the sale of the Birmingham, Wolverhampton and Dudley Railway and other new works to the Great Western Railway Company," deposited in the month of December last in the private bill office of the House of Commons, and for the purpose of considering and determining upon the propriety of introducing into parliament, or of proceeding with or withdrawing the said bill, and if thought fit, of taking such steps for proceeding with or withdrawing the said bill, and passing such resolutions, and giving such instructions to the directors of the said Birmingham and Oxford Junction Railway Company, touching any sale or other disposition of the said Birmingham and Oxford Railway, or for effecting any of the above-mentioned purposes, as the said meeting should think expedient. At that extraordinary meeting the company, by resolutions duly made, increased the number of directors from twelve to eighteen, and adjourned the said extraordinary meeting to the hour of five in the afternoon of the same day. The adjourned ordinary meeting was duly held at the hour of four in the afternoon on the said 13th of March 1847, and it was then moved, that one-third of the directors, who were in office previously to the 27th of February 1847, should retire from office, pursuant to the provisions of the said Companies Clauses Consolidation Act, 1845, and the said Birmingham and Oxford Junction Railway Act, and that the twelve directors should agree or determine among themselves, which of them should retire, and such motion was duly seconded, and carried almost unanimously, by the members present at the same meeting, except the twelve directors, although the chairman refused to put the motion. The shareholders of the company present at the said extraordinary meeting, and also at the said adjourned ordinary meeting, and who concurred in the resolutions then passed, exceeded seventy in number, and represented, personally and by proxy, upwards of 35,000 *shares* in the capital of the said Birmingham and Oxford Junction Railway Company, which consisted of 50,000 *shares*. The twelve directors, however, refused to determine by ballot or to agree as to the individuals to retire from office. The adjourned extraordinary meeting was duly convened at the hour of five in the afternoon of the said 13th of March 1847, and the said company, at that meeting, passed some resolutions as to the future retirement of the six newly elected directors, and the order of rotation in which those directors should go out of office.

And it was further resolved that the proprietors of the company, wholly disapproving of the proposed amalgamation of that undertaking with the Birmingham, Wolverhampton and Dudley line, and the pro-

posed sale of both concerns to the Great Western Railway Company, and not considering themselves legally or equitably bound by the proceedings of the directors, the directors should be instructed not to proceed further with, but to withdraw from, the proposed bill before parliament for uniting the Birmingham and Oxford Junction Railway Company and the Birmingham, Wolverhampton and Dudley Railway Company into one company, and for authorizing the sale of the Birmingham, Wolverhampton and Dudley and other new works to the Great Western Railway Company, and that the directors should be further instructed forthwith to affix the company's seal to the petition then read against such bill, and to cause such petition to be forthwith presented to the House of Commons, and to oppose such bill by counsel and witnesses and all other necessary means in both houses of parliament; and the directors were instructed at the said meeting not to take but to oppose any proceedings for or towards any amalgamation, sale, or lease with or to the Birmingham, Wolverhampton and Dudley Railway Company, or the Great Western Railway Company, or either of them, without the further instructions of the shareholders; and the chairman having refused to affix the common seal of that company to the petition then read at a meeting of the shareholders duly convened, it was further resolved that Sir Harry Verney and any five other shareholders should be authorized to sign the same on behalf of that meeting, and that the directors should be instructed to take measures for adopting and carrying into effect the proposals made to them in December last by the directors of the London and North-Western Railway Company, having for their object the joint use of that line by the Great Western and London and North-Western Companies, either upon the terms proposed, or some equally satisfactory basis of arrangement; and that, failing that, the line proposed should be completed forthwith, and kept independent of either company.

The bill alleged that, agreeably to the said Companies Clauses Consolidation Act, four of the twelve directors ought, at the said adjourned ordinary meeting on the 13th of March 1847, to have retired from the office of directors of the said Birmingham and Oxford Junction Railway Company, and in conformity with the provisions of the said Birmingham and Oxford Junction Railway Act, four shareholders of the said Birmingham and Oxford Junction Railway Company, duly qualified, ought to have been elected by the shareholders then present, personally or by proxy, to supply the places of such four retiring directors; but by reason of the refusal of the defendants, the twelve directors, to determine by ballot among themselves, or otherwise agree as to the individuals to retire, the said shareholders present at such ordinary meeting were deprived of and unable to exercise their right of electing persons to supply the places of the directors who ought then to have retired from office; that it had become impossible to ascertain which of the said defendants ought to have retired from office, and that by reason thereof such defendants were not competent in law to act or vote as directors of the said Birmingham and Oxford Junction Railway Company, and that the six new directors were the only persons competent to act as lawful directors thereof; that the twelve recusant directors had, previously to the said 13th of March 1847, in their character and in respect of their office of directors of the said company, and in trust for and for the purposes of the said company, in their possession, custody, or power, the common seal of the said company, and the minute books, orders, documents and papers, the property of and belonging to the said company; that they had under their controul large sums of money, amounting to upwards of 100,000*l.*, belonging to the said company, and that further sums to a large amount would shortly be placed under the controul of the directors of the said company; that the twelve recusant directors, previously to the said adjourned ordinary meeting, procured to be brought into parliament a bill for amalgamating the said Birmingham and Oxford Junction Railway Company and the Birmingham, Wolverhampton and Dudley Railway Company into one company, and for authorizing the sale of the Birmingham, Wolverhampton and Dudley Railway and other new works to the Great Western Railway Company, and that they had not only refused to set the common seal of the Birmingham and Oxford Junction Rail-

way Company to the petition of the company against such bill, but they threatened and intended to prosecute the said bill in parliament in the character of and acting as directors of the Birmingham and Oxford Junction Railway Company, and to represent themselves before the committee of the House of Commons, and otherwise before Parliament, as a majority of the lawful directors of the Birmingham and Oxford Junction Railway Company, and in that pretended character to endeavour to procure the said bill to be passed into a law: the plaintiffs therefore prayed by their bill that the twelve directors might be restrained, by the order and injunction of the Court, from voting or acting as directors of the Birmingham and Oxford Junction Railway Company, and that they might be ordered and decreed to place the common seal of the said Birmingham and Oxford Junction Railway Company, and all the property and funds, books, deeds, documents and papers of that company in their possession, custody, or power, under the controul of the lawful directors of the said company for the purposes of the said company, and that they might, in the meanwhile, be in like manner restrained from voting or acting as directors of the said Birmingham and Oxford Junction Railway Company, and for further relief as the case might require. The company put in a general demurrer.

The case was fully argued before the Vice Chancellor of England by *Mr. Bethell*, *Mr. James Parker* and *Mr. Willcock*, for the plaintiffs; and

Sir Fitzroy Kelly, *Mr. Stuart*, *Mr. Rolt* and *Mr. G. L. Russell*, for the company.

And on the 13th of April last his Honour delivered the following judgment:—

The Vice Chancellor. — The first question in this case is, whether there has not been an improper omission of electing four persons to go out by ballot? Now, it really appears to me, that the question turns on the true construction of the language which is to be found in the 13th clause, because if the special act had allowed the matter to proceed according to the provisions of the Consolidation Act there would have been no difficulty. Everybody seems to admit that there would have been a going out of four. This being the first time when there was to be any going out at all, there would be a going out of four, which is one-third of the existing number of twelve, to be determined by ballot among themselves —that is, the twelve—unless they should otherwise agree who should go out of the office. Now, the special act of parliament, which, as I understand, is part of that larger thing which is compounded of the special act of parliament, and the Consolidation Act amongst others, is so constructed, as that what is found in the Consolidation Act becomes part of the special act so far as the same, that is, as the provisions of the Consolidation Act, are not modified by or inconsistent with the provisions contained in the special act. Now, what is provided by the special act is this:—In the first place, certain persons were, by the 10th and 11th clauses, appointed directors; and then it is enacted by the 12th clause, that the directors appointed by this act shall continue in office until the first ordinary meeting to be held after the passing of this act; and when you look to the 16th section, you find it is enacted that the first ordinary meeting of the company shall be held within six months after the passing of this act; and then it is directed, that at such meeting the shareholders present, personally or by proxy, may either continue in office the directors appointed in this act, or any number of them, or may elect a new body of directors. In point of fact, what they did was this, as I collect from the bill, they continued ten of the twelve, and elected two as a substitution for two others of the former directors, so that there was a partial continuance and a partial election; and then the 13th section says, "And be it enacted, that at the first ordinary meeting to be held in the year next after the year in which such last-mentioned directors shall have been appointed or elected, the shareholders present, personally or by proxy, shall elect persons to supply the places of directors then retiring from office, agreeably to the provisions in the Companies Clauses Consolidation Act contained." Now, in this respect, as I understand it, there is a variance introduced, so as to make the course of proceeding different from that which would have taken place provided there had not been this special enactment in this special act, and it appears

to me that you must construe this act according to the language in which you find it couched. [His Honour then referred to the principles of construction laid down by Lord Cottenham in *The Attorney General* v. *Malkin* (5), and again proceeded.]

Now, in substituting the words which relate to the act of parliament by the legislature for those words which my Lord Chancellor has applied with respect to the testator, I find it to be, in effect, the opinion of the Lord Chancellor that I am bound to construe these words according to their ordinary meaning. What is the ordinary meaning? Can any human being, when he sees the words, doubt what the meaning was? The act having directed that there should, first of all, be an ordinary meeting to take place, and that such ordinary meeting should be held, within six months after the passing of the act, and which, according to the operation of the Consolidation Act, there being nothing provided as to the time when, would take place in February or August, and having directed what shall be done at the first meeting, which is described to be held independent of the ordinary meeting, the act says, "That at the first ordinary meeting, to be held in the year next after the year in which such last-mentioned directors shall have been appointed or elected." Now, the fact was this, that on the 30th of October 1846 the first meeting—not the ordinary meeting—the first meeting specially appointed by the special act, took place, when there was that species of election of directors which I have described; and what, then, was the ordinary meeting in the year next after the year in which that last meeting was held? The meeting was held in October in the year 1846, and the year next after that year, as I understand it, was the year 1847; and I have not heard one single thing which has induced me to entertain the least doubt on the point, because it is quite clear; but though there may be some little difficulty in adapting the language of the Consolidation Act to the overruling language of the special act, no twisting of the words in the Consolidation Act can have the effect of overruling the language of that act, which is itself to overrule the Consolidation Act; and it appears to me it would be a most dangerous mode of construction to say, that the inferior thing, which is to be governed by the superior thing, shall itself have such an effect as to give a construction to the words of the special, the ruling, act, which those words do not naturally of themselves bear, to take away from the words a meaning which no human being can doubt, for the sake of arbitrarily and constructively, but not of necessity, giving them a meaning which they cannot naturally bear. My opinion therefore is, it is quite clear, on the construction of the act, that there ought to have been in February 1847 such a proceeding on the part of the then existing twelve directors as would have had the effect of removing from the number of twelve, four, to be determined by ballot, unless, according to the language of the 18th section in the Consolidation Act, they should otherwise agree. Now, they neither had ballot nor agreement, and it appears to me the consequence is that by that act, contrary to the provisions of the act of parliament, four persons out of the twelve remained in the situation of directors, in which situation they ought not to be. Well, then, supposing that is the first step, what is the position in which the plaintiffs stand? and I am now speaking of the case in which the objection is made only by the company—as to what other objections may be made by other demurring parties, I know nothing—but it appears on the face of the bill that there was an ordinary meeting. There was also a general meeting—and, in truth, they seem to have taken place on the same day, by being called at different hours—but this appears on the face of the bill, that when some measure was proposed, a Mr. G. Turner moved a resolution which was carried by a very great majority—I think the expression is "unanimously." Well, it appears that the chairman, as it is stated, refused to put the question, and it also appears that the general meeting, of which I have heard so much with respect to its controuling power, has exercised its power, but in vain, because, though there was a general meeting, and a particular resolution was carried unanimously, the directors *de facto* refuse to comply. Is the mockery of having general meetings over and over again to be gone through? If one disobedience to the voice of the general

(5) 2 Phil. 64; s. c. *ante*, p. 99.

meeting is not sufficient to prove the insufficiency and the impropriety of the directors, the twelve, how many more are there to be held to do it? It appears to me, that when once it has been shewn that the great corrective power, viz., the voice of a majority at a general meeting, has been tried in vain, nothing remains then but an appeal to a court of justice. Now, the bill represents that these twelve gentlemen have got possession of the seal and of the property of the company, and that they intend to apply it according to their views. Now, I apprehend that every single individual shareholder has a direct personal interest in seeing that the government of the affairs of the company shall be carried on according to the manner and form which has been prescribed by the act of parliament; and it never was intended, from what I have observed going forward, and I have no reason to believe it ever will be allowed, that any set of men, either improperly chosen directors or improperly continued as directors, shall arrogate to themselves that mode of dealing which virtually would set themselves above the authority of the act of parliament under which they are constituted. Now, I cannot but myself think, that in a question as between the plaintiffs alone, some separate shareholders, and the directors themselves, the thing is reasonably plain.

The point that I have to determine is this, whether if a bill is filed by some of the shareholders against these peccant directors and the company, that bill is improperly filed because the company are parties. Now, one thing is reasonably plain, and that is, that the bill could hardly be said to be maintainable if the company were not parties: that is pretty plain, because the bill seeks to have redress with respect to the proper use and proper dominion of the seal of the company and the property of the company, including not only its money but its books and papers; and it would be a startling thing to say that the Court itself is to deal with such a subject without having present before it the company to whom, in point of law, it belongs; I say, in point of law, it belongs. But, then, it should be considered, that though the act of parliament has constituted the corporation, yet it has constituted that corporation in a degree not merely as a trustee for the benefit of the shareholders, but as the medium by means of which, by whose instrumentality, and by whose acts, the benefit of the shareholders shall be accomplished. Then, the company object on the ground,—as I recollect, from what has been so very ably urged—that, in fact, this very point has been decided by the Vice Chancellor Wigram in the case of *Foss* v. *Harbottle;* whereas it appears to me that that case was totally dissimilar from the present, because there was nothing to shew that the evil complained of might not be cured by having a general meeting, and so proceeding according to the authority of the act of parliament. There the relief was refused, that is to say, the demurrer was allowed, because it sufficiently appeared on the face of the bill, to the understanding of the learned Judge, that the company itself might give the relief which the plaintiff sought to have. It is admitted, and it cannot be denied, that if the company seek to do an illegal act, the act of the company may be restrained; and where is the substantial difference between an injurious activity on the part of the company and that injurious passiveness which is represented throughout the whole of the bill? Because if the company does nothing, and according to this bill is so incapacitated by reason of the fact that the twelve directors have got possession of the seal, and have virtually the dominion over the company, is then that inert, inactive mass called a company, which will not stir and cannot stir—is that company to say, because we will do nothing, therefore you (the plaintiffs) shall not have relief? It really does appear to me, that there is no question the Court will interfere as against the company. The case that was mentioned respecting the Alliance Insurance Company (6), and several other cases that I might mention, proves in my own mind that I cannot draw any substantial difference between the injury effected by activity and the injury allowed to continue by inactivity; and it really does appear to me, therefore, that that objection is altogether futile.

One or two other slight circumstances were mentioned, and particularly, as I understand it, it seems to be represented that six might act. It is perfectly true

(6) Natusch v. Irving, Gow on Partnership, App. 404.

that six might act, and especially as it is said that five might be a quorum. There is no doubt about that. That is not the point; because if, by what has taken place, there ought to be eighteen directors, there must be eighteen proper directors, until the company have at some meeting resolved that the number shall be altered; and with respect to the twelve, if you find that the twelve have already acted wrongfully, and that now they exist in this character, viz., that eight of them, nobody can tell who, may lawfully be directors, but that four of them, nobody can tell who, ought not lawfully to be directors, you have a mass of twelve men who all combine together to keep up an objection to themselves of the number of twelve, which at once might be removed if they would only, by consent or by ballot, remove four, and choose some other four. Therefore, it seems to me, that the conduct of the twelve directors is that of which the plaintiffs have a right to complain; the inertness of the company is a reason why the plaintiffs themselves should come into equity for the purpose of having relief; and the only question is, whether they can have relief, and, as I understand it, Sir Fitzroy Kelly has said the only relief must be by mandamus. But what is asked by this bill is not actual relief in the way that the Court is to determine who are to be directors, but that the Court shall interfere, by restraining from voting or acting as directors or as a director of the company, these twelve people, and that they may be decreed to place the common seal of the company, and all the property, funds, and books, and so on, under the controul of the lawful directors of the company, for the purposes of the company. That is a species of negative relief which it is quite competent for the Court to give, because it has been decided, that with respect to partial relief, which consists in restraining the party complained of from doing an injury, that he may be restrained, although the Court itself is not able, and has no authority either in law or in fact, and could not by any means have the power of carrying on the whole concern, with respect to a part of which only there has been a complaint. It appears to me, that that being perfectly settled in this court, whatever may be the method that may be adopted for the purpose of putting in twelve proper directors in the room of the present twelve directors who are complained of, it seems to me that it is quite competent for this Court to interfere to the extent to which the relief is asked, or some portion of that relief, which is quite sufficient for the determination of this demurrer. Therefore, according to the best view of the case which I can take,—and I have had an opportunity of considering it in the interval, and it has been argued with great ingenuity and ability,—my opinion is, the demurrer must be overruled.

The company appealed from this decision, and on the 16th of April the appeal came on to be heard before the Lord Chancellor; and pending the appeal the plaintiffs obtained an injunction from the Vice Chancellor.

Sir Fitzroy Kelly, *Mr. Stuart*, *Mr. Rolt*, and *Mr. G. L. Russell*, for the company. —This is a bill by four individual shareholders, not by the company. Three questions arise:—First, ought a re-election of directors to have taken place, and the twelve to have balloted out four of their number at the meeting of the 13th of March? Secondly, can such a suit be maintained by these four individual shareholders not suing on behalf of themselves and all others. Thirdly, assuming they ought to have balloted out four, have they thereby ceased to be directors?

As to the rotation, the only clause of the general act which contains any directions respecting the directors going out of office, is the 88th. The time is at the end of the first year after the first election of directors; the number, either the prescribed number or one-third of the whole; the manner, by ballot, unless they agree among themselves which should go out. The difficulty arises from the 13th section of the special act. The words "as aforesaid" in the 88th section of the general act, refer to the 83rd section, which fixes the term of continuance in office as a director; but as the special act contains a provision on the same subject, the words "as aforesaid" refer to that special provision. Directors are to be elected in 1847, in the room of other directors who are not required to retire till 1848. Between the 13th section of the special act and the 88th section of the

general act, which is to prevail? The clause which fixes the time of the retirement of the directors; because that is the first in order of time; and until there is a retirement, new directors are not wanted. It is clear the legislature intended the directors, elected by the proprietary at large, to continue a year at least in office in all cases. As to the directors first appointed, it may be different, because they are only named by the original projectors. In the 93rd section, as to the appointment of chairman, the words "next after the year," mean "next after the year of office." If there is any doubt as to the construction, it is for those who, instead of obtaining the opinion of a court of law, resort to the summary remedy by injunction, to remove the doubt.

The second question is, whether this remedy is open to these plaintiffs. No case can be found of a suit in this form instituted under such circumstances by a few only of the whole body of proprietors. No doubt such a bill may be filed where the act complained of is an act of the corporation at large; but where the complaint is that of the entire body, only the body corporate can sue. In *Ware* v. *the Grand Junction Waterworks Company* (7), the injunction was refused, so far as it was to restrain an application to parliament, because such a right is incidental to the nature of companies. So far as the company attempted to exceed their powers, the injunction was granted. The principle is, where the body are wrongdoers, any individual may sue. In *Ward* v. *the Society of Attorneys* (8), the injunction was granted because the corporation had no authority to put an end to their own existence. The resolution was to surrender the charter, and transfer the funds until a new charter could be obtained: a few shareholders only objected. Here the majority at the meeting of the 13th of March were against going to parliament: the whole corporate body are against the proceedings of the directors. The case is identical with *Foss* v. *Harbottle*. The governing body are only the agents of the corporation. It is their masters, their employers, their *cestuis que trust*, i. e. the corporate body, who must complain. As to the suggestion that the corporate seal must be put to the solicitor's retainer before a suit can be instituted, it is idle: the seal may be lost; the corporation may have a dozen seals.

Then the bill says, the whole twelve directors are incompetent; the remaining six are the only competent, the only lawful directors. But it is expressly provided by the 90th section of the general act that the directors for the time being are to exercise all the powers and functions incident to the office. To say, that six only can exercise those powers until an alteration is made in the constitution of the governing body by a mandamus, is to repeal the 90th section of the act of parliament. Is there anything in the act of parliament to shew, that in a certain event they cease, *ipso facto*, to be directors? If so, and the day of election passes, the whole business of the company comes to an end. There are no directors. The 10th section provides for increasing or reducing the number of directors. There are definite provisions as to what shall disqualify; but no vacancy arises, unless it is specially moved for. Subject to the undoubted jurisdiction of this Court to alter the constitution of the governing body, they continue directors until disqualified; or until they go out by rotation, which can be done only by ballot, or by writ of mandamus from the Queen's Bench to elect. The bill is suicidal, because it says, remove them from the office of directors, or they may go and act as directors. In municipal corporations, if the charter day passes, there is no further power to elect: the whole proceedings would be void. There are only such powers as the act gives. *The Queen* v. *Alderson* (9) shews this. The town councillors elected an alderman, but did not determine the rotation in which the previous aldermen should retire. They did so subsequently. Alderson's appointment was impeached, and it was held that the previous aldermen continued in office, that no vacancy had occurred. It is the same here. If they are directors, they are entitled to act. If there has been misconduct, let the corporation complain.

(7) 2 Russ. & Myl. 470; s. c. 9 Law J. Rep. Chanc. 169.

(8) 1 Coll. 370.

(9) 1 Q.B. Rep. 878; s. c. 10 Law J. Rep. (N.S.) Q.B. 277.

Mr. Bethell, Mr. James Parker, and *Mr. Willcock*, for the plaintiffs. — There are two demurrers; one, by the twelve directors, which has not been heard; the other, the present demurrer, in the name of the company. The bill has not been fully brought before the Court. In February 1847, the first ordinary meeting was held, and was adjourned to the 13th of March. On that day an extraordinary meeting for various purposes was held; one of which was, to elect additional directors; another was, to adopt certain measures, and to abandon certain other measures. On the 13th of March a motion was made that the twelve directors should determine which four of them should go out of office. The chairman refused to put it, but it was carried by the shareholders; notwithstanding this, the twelve claim to exercise the functions of lawful directors, so as virtually to exclude the six new directors, keeping the affairs and property of the company in their own hands, so as to represent the company exclusively: this is what the bill states. The first point is, was it not binding on the twelve to determine which of them should go out, and whether the third ought not to have gone out, and whether this ought not to have been done under the statute.

[The Lord Chancellor. — And not having done so, you say they cease to be directors, *de facto*, by non-compliance with the statute.]

Each member of the body may be the one who ought to have gone out. Each is open to the imputation of being disqualified. Among the twelve there are four who are incapable of acting, but which they are has not been determined. The whole twelve are, therefore, incapacitated to exercise the functions of directors. As to the construction, two errors are made on the other side. In calling on the Court to construe the clauses, the general and special act have been treated separately: this is not the mode in which the Court is required to deal with these acts; they are to be read as one act; the provisions of the general act are to be taken as component parts of the special act. They forget the process of incorporation. The first section of the special act tells you how to deal with the clauses of the other act, viz., that the special act is to prevail; the general act is to be incorporated into the special act, and be modified, so as not to be inconsistent with the special act, but to carry it out. There is the 13th section of the special act, but it was said to be necessary to refer to the 88th section of the general act. There is no provision for retirement of directors. That argument goes on the hypothesis that the 88th section could not be made subservient to the special act, or read as part of it. If the general act only had prevailed, the first ordinary meeting would have been in February 1847; the special act, by section 16, directs the first general meeting to be held any time within six months. The act passed 1st of August 1846. It is obvious the first ordinary meeting might have been in 1846 or 1847, for electing directors. The special act provides for either of the two events. The general act assumes the meeting to be in February; this being varied by the special act, there was needed a special provision for the retirement of the first set of directors. The Court must make the general act subservient in this matter to the special act. The meeting in 1846 was in exercise of the power of the special act, section 12. Ten of the old directors were then continued. This left it still a matter of necessity, as it is admitted, to have the general meeting in February 1847; for in this respect, section 66. of the general act operated, in case the first meeting under the special act was held in 1846, as in fact it was.

[The Lord Chancellor.—That is assuming "year" means "current year." What clause in the general act makes it necessary to have a general meeting in February?]

Section 66. If there had been no special provision as to the six months, there must have been a retirement in February 1847. If the meeting was held in 1846, the general act would have prevailed: section 13. indicates this: if in 1847, the directors would not go out until 1848. The construction on the other side involves absurdities as to intention, quite as great as its inconsistency with the words of the act. As to section 88. it is said that here was nothing to which the words "continued in office *as aforesaid*" could be referred, but to section 83. But read section 88. as part of the special act, and then all difficulty is removed; and read section 88. of the general act as part of

section 13. of the special act; the words "*as aforesaid*" will refer to the 12th section. Then all harmonizes. The construction becomes plain. Section 12. is taken bodily from section 83. of the general act. Then the first difficulty vanishes.

[The LORD CHANCELLOR.—Suppose the 88th section had stood alone, not controuled by any special provision; they would go out of office in December; but there are no means of appointing successors till February, if the clause means the end of the then current year. I am seeking instruction from the general act as to the meaning of the word "year." It must mean there a year's duration.]

The duty of codification is thrown upon the Court by these acts. If the first meeting was in 1846, the rota of the general act would apply. If in 1847 the alteration of the special act applies. The word "year" in the 13th section, means "year of our Lord." "After the year," must mark the time of a particular occurrence; not a period during which any functions are exercised. It points to a succession of events. The 88th section cannot be construed alone; but as incorporated with, and subservient to, the special act. The words "at the end of the first year," cannot be so incorporated, because the special act expressly provides the time.

The principles on which this Court acts as between a corporation and strangers are well settled, so also between a corporation and its members. The cases of *Agar* v. *the Regent's Canal Company* (10), and *Blakemore* v. *the Glamorganshire Canal Company* (11) are early authorities enunciating principles which have since been more fully adopted. The Court will interfere to confine a company within its express powers and statutory provisions. Here the bill states the refusal of the directors to abide by the imperative command of the act of parliament, and also that they have thus refused, in order to carry out other purposes at variance with the purposes of the company. Under section 9. of the special act, there is a discretionary power to sell to the Great Western Railway Company. It is not an authority to amalgamate: that goes to destroy the very purpose for which the Company was established. The bill mentions three acts; two of them being contrary to the acts of parliament; the third, being a gross breach of trust in prosecuting a bill before parliament, for uniting this company with another, in defiance of the provisions of the act. If a wrong is done, it is a wrong to each individual shareholder.

[The LORD CHANCELLOR. — There is hardly a railway company in the kingdom which does not come to parliament for extension of powers. If a single shareholder may come here at the beginning of the session for an injunction to restrain such application to parliament, not only a committee of council for railways would be necessary, but it would engross the whole time of this Court.]

There is here, in addition, the going to parliament against the wish of the majority of shareholders. *Attorney General* v. *Wilson* (12) shews the right of individuals to bring a bill against a company and the managing body — *Adley* v. *the Whitstable Company* (13), *The Corporation of Colchester* v. *Lowten* (14). Corporations are trustees for individual members — *The River Dunn Navigation Company* v. *the North Midland Railway Company* (15).

[The LORD CHANCELLOR.—Yours is not the case of a *cestui que trust* complaining of his trustee; because you say they are no longer trustees. The character of director is at an end.]

Kemp v. *the London and Brighton Railway Company* (16), *The Queen* v. *the Justices of Kent* (17), *Child* v. *Hudson's Bay Company* (18), *Frewin* v. *Lewis* (19). *Ware* v. *Grand Junction Waterworks Company* was reconcileable with the last case. The 6 & 7 Vict. c. 89. arose out of the case of *The Queen* v. *Alderson*. The argument as to the mode of proceeding by mandamus did not prevail in these cases. The acts of these directors were open to the imputation

(10) Coop. 77.
(11) 1 Myl. & K. 154; s. c. 2 Law J. Rep. (N.S.) Chanc. 95.

(12) Cr. & Ph. 1; s. c. 10 Law J. Rep. (N.S.) Chanc. 53.
(13) 17 Ves. 315.
(14) 1 Ves. & B. 226.
(15) 1 Railway Cases, 135.
(16) Ibid. 504.
(17) 2 Q.B. Rep. 686; s. c. 11 Law J. Rep. (N.S.) M.C. 26.
(18) 2 P. Wms. 207.
(19) 4 Myl. & Cr. 249.

of invalidity. The only safe course was to suspend them.

Sir Fitzroy Kelly replied.

In the course of the argument His Lordship observed, that if the 88th section stood alone, the directors must go out of office in December, and there would be no means of electing other directors till February: that was upon the supposition that "year" meant a year's duration. He found nothing in the general act compelling any of the directors to retire, and it was admitted there was nothing in the special act. That if each shareholder could come from time to time and object that any particular corporate officer was not duly elected and was not entitled to exercise the corporate functions, this Court would draw to itself all cases relative to corporate bodies. This Court would have to determine whether a mayor was properly elected; and that there was no allegation by which the bill could be sustained, independently of the statements which referred to the disqualification of the directors.

Apr. 28.—The Lord Chancellor.—This is a case in which four persons, not alleging distinctly that they are shareholders in a railway company, but describing themselves as shareholders in a railway company, file a bill in which they allege that, owing to circumstances which I do not particularly enter into, twelve persons who were originally appointed directors ought at a day now passed to have voted or balloted out four of their number, under the provisions of the act by which they are constituted, and to have elected four others in their place; that they omitted to do so, and that consequently there is not now a body of directors contemplated by the act, and therefore praying for an injunction against anything being done; and the terms of the injunction prayed are, that those twelve persons may be restrained by the injunction of the Court from voting or acting as directors or as a director of the railway company, and that they may be ordered to place the common seal of the company, and all the property, and funds, and deeds, and so on, in their possession belonging to the company, in the hands of six other persons, who they allege were appointed directors under the provisions of the act authorizing the company to increase the number of their directors from twelve, the number originally contemplated, to eighteen. The result, therefore, of the injunction prayed is, that twelve out of the eighteen who are now exercising the functions of directors may be restrained from acting, and the whole duties of the company may be performed by the six.

Now the first thing that occurs on that injunction is, that there is nothing in the bill which prays the Court to set right what is alleged to be an error; but there being four, according to the allegations in the bill, who ought to have gone out of office, and it being, as the bill alleges, impossible to ascertain which of the twelve are to be the four to go out of office, it assumes that the whole twelve are illegally exercising the functions of directors, and that they ought all to be restrained from performing the duties of the company as directed by the act.

Great difficulties arise in the construction of the act, and it is not my intention to give any opinion as to the construction of it; because I think I see quite sufficient to make it my duty to allow these demurrers without reference to the construction put on the act; and one of the grounds on which I have come to that conclusion is, that it is not within the jurisdiction of the Court to entertain that question at all. I abstain from giving any opinion on a matter which, according to the opinion I have formed, is not within the jurisdiction of the Court.

The bill is, as I stated, a bill by four of the shareholders, not alleging that they are suing on behalf of themselves and others, but in their own individual right. It is quite clear, that some years ago nobody could have entertained a doubt about such a bill being demurrable; of that there could be no doubt. But the rule of the Court has been in some respects relaxed, in order to meet the exigencies of modern times, and to adapt itself to the different cases that come before the Court, it being thought that too strict an adherence to the former rule would operate as a denial of justice, and leave parties who have real grievances without a remedy. But the relaxation of this rule ought not to extend, and has never been extended, beyond the exigencies of the

case itself; it has been enlarged only where it appears that unless the Court had adopted that course there would be no remedy for the grievance complained of.

Now, I see in this bill not only no such case of necessity; but the most obvious, the most reasonable, and the most accustomed mode of correcting the grievance alleged to exist, if it does exist, is to be found even in the allegations contained in the bill itself. When first the rule was so far relaxed as to enable certain persons, interested shareholders, to sue on behalf of themselves and others, it was confined to this, and must still be confined to this, where there appears to be an evil complained of common to all those on whose behalf the suit was instituted; because then there is a common object and a common purpose, and the interests of those who are not on the record may very well be represented by others who are on the record, and whose interests are bound up with and are identical with the interests of those not on the record. That was the case of *Taylor* v. *Salmon* and *Wallworth* v. *Holt;* and, acting on that rule, the distinction is taken, and is the very foundation of the course then adopted,—if there be any one object, in respect of which the suit be adverse to the interest of any of the shareholders, then they cannot be of course represented by those who are on the record asking for that, the granting of which would be, or possibly might be, injurious to the interests of the persons that should be represented. In that case, they must be made defendants, however numerous they may be, because each and every of them may have a case to make, adverse to the interest of the party suing. If they are so numerous that it is impossible to make them defendants, a state of things arises for which at present no remedy has been administered, but that is not an inconvenience arising in the present case at all. In the first place, in these cases, where the common interest—where the interest of a multitude of people is asserted by some few suing on behalf of themselves and others, it is a case in which they, either directly or indirectly, as represented by the plaintiffs, are all supposed to be parties. They are not all parties in fact, they do not appear separately, but the Court permits—as it has done in other cases, where there was no possible objection to that course of proceeding—it permits the plaintiffs to represent them, and to litigate the matter on behalf of themselves and others; but in no one of these cases has it ever been permitted for one or two to institute a proceeding common to all, and in effect to be made for the benefit of all, in their own individual names only; and the evil consequence of that will be found perfectly apparent, because, if it were to be permitted to one or two, it must be permitted to each and every of them just the same; and there might be as many bills filed as there are shareholders in any one of these companies, all praying the same thing, or something different—it is quite immaterial which—but all raising the same question in a hundred or a thousand suits. Now, that never has been permitted; there has never been a case in which individuals not suing on behalf of themselves and others have been permitted to bring before the Court a question common to all. If they have an individual case, of course they may come before the Court,—as a creditor in an administration suit may file a bill for his own debt, but he cannot file a bill to administer the estate without associating with himself those who are interested with him in the administration of the estate. He may file a bill to get his own debt paid, but he cannot administer the estate; the others have no interest in the debt which he wishes to be paid, but the others are interested in a proceeding which leads to the administration of the property in which they have a common interest. I think, therefore, if even there was no other objection to the present suit than the shape and form in which the bill is filed by persons in their own individual character, and not professing to act on behalf of themselves and others, it would be fatal to the bill as it now stands. No doubt that might be very easily corrected by amendment, and therefore it would not lead to any decision which would operate as disposing of the question between these parties.

But there is another and much more important question which arises and exists in the present suit. This is a bill by persons interested in the prosperity, we will suppose, or at all events members, of that corporation as shareholders. This, which is complained of, is not personal to

themselves at all; it is, if true, a usurpation on behalf of the twelve persons claiming to be directors, who are, according to the construction put on the act by the plaintiffs, not entitled to that character, or four of whom are not entitled to that character; it is, therefore, a usurpation of the rights of the corporation. They say they have got their seal, they say they have got their property, they are treated by the bill as persons who have improperly possessed themselves of this interest belonging to the corporation; and, therefore, it is prayed that they may hand over all they have in their possession to those who, according to the bill, are the persons who are the proper directors of the existing company. A case in principle identical with the present, I think, is the case before the Vice Chancellor Wigram of *Foss* v. *Harbottle*; that case has been attempted to be distinguished, but I think that attempt entirely failed: that was precisely the same case. There, there were two persons, members of a corporation, who complained of certain acts done by persons having exercised the functions of the corporation. It made, indeed, a much stronger case in support of the bill than exists here, because it made a complaint of malversation on the part of those who were exercising the functions of the company, by which, no doubt, the interest of the plaintiffs as well as the other shareholders would be affected. The Vice Chancellor Wigram, after examining all the cases, came to the conclusion that such a bill could not be supported. It is said, indeed, that one reason for his coming to that conclusion was, that it appeared on the face of the bill that there existed in the company the means of rectifying the evil complained of; and that the shareholders might, by a general meeting, put an end to the state of things which formed the complaint set forth in the bill. That was the mode, and the only mode, in which that case was attempted to be distinguished from the present. But it appears to me quite clear, there is precisely a similar allegation in the present bill; because this bill alleges that there is a usurpation of the rights of the company, and a large majority of the shareholders of the company are also of that opinion. There is nothing to prevent the company, therefore, *quà* company, if they are of the same opinion with the plaintiffs, from proceeding in the mode which will put an end to this matter, if it be illegal, that is to say, if it be that which is not proper under the constitution of the act under which the company exists. What allegation is there on the face of this bill that the company, who are properly the parties to complain, do not complain, or cannot file a bill themselves, in order to obtain the relief which this bill prays? None whatever. There is no allegation; on the contrary, they shew if they are minded so to do, they may do so; but there is no allegation to shew they cannot, and no allegation to shew that, on the application of those interested under them, they have refused to do so. For any thing that appears, the company, if they are all of the same opinion, may file a bill, a legitimate bill, that would justify the complaint made by this bill, and ask for that relief which will free them from the difficulty and the objection that exists in the present case; and then there will be plaintiffs, a legally constituted body, authorized by the act to represent the interests of the different shareholders in that company, asking relief against those who are alleged to be usurping the interests of the company. I, therefore, do consider the case of *Foss* v. *Harbottle* as identical with the present case; and in everything there stated, which is necessary to be considered for the purpose of ascertaining whether according to the rules of this Court the present bill could be maintained, I quite concur; and, as that judgment, which was very much considered, and very elaborately delivered by the Vice Chancellor Wigram, I think very fairly and properly exhibits what the principle and practice of the Court is under those circumstances, I do not think it necessary to go further into the matters suggested by that judgment, than to say, I entirely concur with it; and, finding this question falling within all the principles on which that decision proceeded, I cannot for a moment hesitate to adopt the opinion expressed by the Vice Chancellor Wigram, in the judgment he pronounced, and to apply it to the present case.

But there is another thing behind, even if all this were not in the way of the plaintiffs, which must be very carefully considered

before any other attempt is made to apply to this Court in a case similar to that stated in this bill; there is nothing alleged on the face of this bill at all by which the plaintiffs have any interests personal to themselves. It is altogether a statement of facts alleged to be an injury to the company; and the ground, the only ground, on which that complaint rests is, that those who profess to hold the office of directors are not directors: that the office which they pretend to hold in the corporation of which they are members does not give them a legal title to the character which they profess, and that they are alleging themselves to be directors, whereas they in point of fact are not; all turning, therefore, on the question whether they are or are not entitled to the corporate office of which they profess to exercise the functions.

Now, I asked several times during the argument, whether I could be referred to any case in which this Court had exercised jurisdiction on a statement of facts confined to what I have now stated, where the whole turns upon the legality or illegality of the title of those who profess to exercise the office? That they may be trustees founded on the supposition of their being corporate officers, is quite immaterial, because the preliminary fact is,—Are you or are you not corporate officers, as you profess to be? No such case has been cited; ample time was afforded during the course of the argument by the interval of several days which occurred, and the counsel, who no doubt exercised all their usual diligence and industry, could find none. When I asked the question, I certainly had no doubt in the world of the result of the answer which ought to be given to the question; but I am very glad that counsel had an opportunity of searching, in order to see whether I might have been under an error in that respect; but their not producing any such case satisfied me that no such case exists. This is the first attempt that ever has been made to call on this Court to exercise jurisdiction under these circumstances. In the first place it will be sufficient for me not to embark in a jurisdiction of which it will be extremely difficult to find the limits or the end, or to anticipate what might be the result of assuming such jurisdiction. None of my predecessors have done it, and I will not be the first myself to commence it. Quite independently of the great inconvenience which would arise from assuming a jurisdiction of that sort, it is contrary to all the principles to entertain it here; it is a pure question of law; there is no equity in the case at all, although there may probably be in certain proceedings depending on that question of law; but the fact whether these are corporate officers or not is not a question of equity, it is a pure question of law; and in this instance I am called upon to exercise that jurisdiction (which, if the Court thinks it a proper case for a court of equity, it might be proper to exercise) before the preliminary fact whether these parties are corporate officers or not is ascertained. In a court of law, other modes are open by which that question can be tried, and I will not be the first to assume the jurisdiction of bringing it into a court of equity. Just consider for a moment what would be the consequence, if I were to do so. It is not pretended that I can give directions to set this corporate body right, if they have got wrong; I am not asked to do it. This bill does not ask that I may direct a meeting to be held in order to decide which four of the officers ought to have gone out, and if so, then to direct that that which is wrong may be set right. It is not pretended that I have any jurisdiction to do that; but I am asked to restrain them from acting. Then am I not asked to do that which puts an end to the corporation altogether? If they have got wrong, and I cannot put them right, and because they are wrong I am to prevent them from acting, I might be putting an end to the whole corporation by my injunction. It so happens that six new directors have been appointed; but, supposing six had not been appointed, there would be none but the remaining twelve. Then these persons come here and say, four out of these twelve ought to have gone out, and because they did not go out the whole twelve are disqualified to act as directors, and because there are four amongst you who are not directors, you professing to act together, let a court of equity restrain all the twelve from exercising their functions at all; and these shareholders in this railway company, professing to have the interest of the railway company at heart, and putting them-

selves forward on the present occasion as litigating for the benefit of the railway company, and at the expense of the company, ask me on behalf of the company to assume a jurisdiction which will probably in this case, and no doubt in many others, lead to an entire stoppage of the whole functions of the company.

These are three reasons, any one of which appears to me sufficient to shew that this Court ought not to exercise the jurisdiction which it is asked to exercise; and, therefore, it would not only be unnecessary but improper for me to pronounce any opinion upon the merits of the case when the preliminary objection prevents me from exercising the jurisdiction of the Court. I am, therefore, of opinion that the demurrers must be allowed.

On behalf of the defendants, it was then asked that the injunction might be dissolved; and that they might have the costs of that motion in the Court below in the same way as if it had been refused.

It was contended for the plaintiffs, that the motion for an injunction followed necessarily on the overruling of the demurrer, and that the defendants should not have discussed the motion, but allowed it to go; and, if the decision of the Vice Chancellor with respect to the demurrer was reversed, the order for the injunction would follow also. That the injunction granted by the Vice Chancellor was consequential on his overruling the demurrer, and the plaintiffs were not wrong in moving for that injunction.

The Lord Chancellor.—But I am of opinion they were wrong. It is quite clear, according to the opinion I have formed, that there is no foundation for the bill; and, if so, there was no foundation for the motion. The other parties could not prevent the plaintiffs from pressing it on, and I am of opinion they are entitled to the costs of the motion for an injunction below, but they are not entitled to any costs here.

Note.—This case was decided in Easter term; but it appeared desirable to publish it as early as possible.

V.C. Jan. 22. } PRICE *v.* PRICE.

Administration—Sale of Real Estate to pay Debts—3 & 4 Will. 4. c. 104.

In a suit for administering an estate consisting of real and personal property, where the personal property was only sufficient to pay the debts, but not the costs, it was held, that the personal estate must be applied first in payment of the costs, and then in discharge of debts as far as it would go; after which, the real estate must be sold to pay the remaining debts.

This bill was filed by the children of a person who had died intestate, by their next friend, to administer the estate, which consisted of real and personal property. The usual decree was made, and the Master found a certain amount of debts, and that the personal estate which had been realized was just sufficient to pay the debts, but not the costs. A question was raised upon petition, whether under the statute 3 & 4 Will. 4. c. 104. the Court had power to direct a sale of the real estate for the payment of debts, the creditors not being parties to the suit. The case of *Dinning* v. *Henderson* (1) was referred to, where it was held, that the Court could administer the assets of a testator where the bill was not filed by a creditor.

Mr. Whatley appeared in support of the petition; and—

Mr. Borrett, contrà.

The Vice Chancellor.—I think the Court has jurisdiction in a case of this description; but I must have it appear as a matter of fact, whether the funds are or are not sufficient to pay the debts. The best course will be to take an order for payment of the costs up to the present time out of the fund realized, and then apply the fund as far as it will go in payment of the debts, and reserve liberty to apply to the Court, when the fund is exhausted, for leave to sell the real estate for payment of the rest of the debts.

(1) 2 Coll. 330.

M.R.
Jan. 27;
Feb. 8;
Mar. 11, 13, 23.

FOREMAN v. GRAY.

Amendment—Irregularity—General Orders of 1845—Jurisdiction.

On motion by one of several defendants to dismiss a bill for want of prosecution, the plaintiff shewed for cause an order to amend the bill obtained since the date of the notice to dismiss, one of the other defendants not having put in his answer to the bill; and on payment of the defendant's costs, no order was made. The same defendant afterwards moved to discharge the order to amend for irregularity. The plaintiff had been guilty of great delay in proceeding with the cause, and the defendant who had not answered was the husband of the plaintiff, and represented by the same solicitor. Motion refused, but without costs.

In a case where one of the defendants to a bill had not put in his answer, the plaintiff, after great delay, and after notice of motion had been given to dismiss the bill for want of prosecution, obtained an order as of course to amend the bill:—Held, that under the 66th of the General Orders of May 1845, the order was not irregular.

Held, however, that though such an order could not be considered to be irregularly obtained, the same might be discharged on the merits, on account of the misconduct of the plaintiff with reference to the proceedings in the cause, but the motion in such case must be before that branch of the Court to which the cause is attached.

The bill was filed on the 23rd of January 1845, and amended on the 23rd of July following: on the 3rd of October in that year the answer of the defendant John Gray was filed, and was to be deemed sufficient on the 9th of December 1845; the answer of the defendant W. G. Gray was filed on the 16th of December 1845, and was to be deemed sufficient on the 10th of February 1846, and if there had been no other defendant to the bill, the time for amending the bill would have expired on the 10th of March following. On the 1st of June 1846 an appearance to the bill was entered by the plaintiff's solicitor, for the defendant Charles Foreman, the plaintiff's husband, but no answer was put in by him. On the 30th of April 1846, an order was made for the production of documents admitted by the answers of the defendants J. and W. G. Gray to be in their possession, but it was never drawn up. On the 17th of December 1846, notice of motion was served on the plaintiff on behalf of the defendant W. G. Gray, to dismiss the bill for want of prosecution for the 21st of that month, and on that day the defendant W. G. Gray was served with an order to amend the bill on payment of costs.

Mr. Elderton, in support of a motion to discharge the last-mentioned order for irregularity, contended that the existing order to amend prevented the defendant proceeding to dismiss the bill for want of prosecution; and that such an order could not have been obtained by the plaintiff, if the plaintiff had duly got in the answer of the friendly defendant Foreman, who was the husband of the plaintiff, and represented by the same solicitor, and that the omission to get in such answer amounted to a fraud on the General Orders, and that such an answer did not come within their true meaning. The observations contained in the judgment in *Stinton* v. *Taylor* (1) were referred to in support of the motion.

Mr. Heathfield, for the plaintiff, contended that the application was an irregular one, the order in question to amend the bill being the first that had been obtained after answer; that in *Dalton* v. *Hayter* (2), a distinction was taken by the Court as to the meaning of the words "the last of the answers," and "the last answer," and "last of the several answers" contained in the Orders of 1845, in cases of dismissal of a bill and amendment thereof; and that the right to amend as well as to move to dismiss the bill must be admitted on both sides.

The MASTER OF THE ROLLS, after adverting to the great delay with which the plaintiff was chargeable, ordered the motion to stand over to enable the plaintiff to account for the delay, and for the consideration of the practice in the mean time.

(1) 4 Hare, 608; s. c. 15 Law J. Rep. (N.S.) Chanc. 321.

(2) 7 Beav. 586; s. c. 15 Law J. Rep. (N.S.) Chanc. 33.

Feb. 8.—On this day the motion was again brought before the Court, when—

Mr. Heathfield stated that he had no further evidence in the case, but submitted that according to the strict practice of the Court, the plaintiff was entitled to look at the answers of all the defendants before she determined what further proceedings she should take in the cause; and if any one of the defendants had not answered, the plaintiff had a right to an order to amend her bill; that as the defendant had been paid by the plaintiff his costs of the motion to dismiss, and had had several orders for time to answer, and had not put in his answer until after he had been attached for contempt, the Court would not look very favourably on the present application. *Peacock* v. *Sievier* (3) was also cited in opposition to the motion.

The Master of the Rolls, after stating the dates of the different proceedings in the suit, and noticing that as one defendant had not yet answered the bill, the plaintiff could not be held to have been guilty of irregularity in obtaining the order to amend, observed, that although there was no pretence for the leave obtained to amend the bill, except in respect of the defendant Foreman not having put in his answer, still that circumstance did not render the order obtained irregular; but the case might be considered such as to make it necessary hereafter to issue a General Order on the subject, and his Lordship declined to grant the order sought, but without costs.

The defendant W. G. Gray's former motion to discharge the plaintiff's order to amend having failed on account of the informality of its wording, it was now moved by *Mr. Elderton*, on behalf of the same defendant, that the amended bill might be taken off the file, and that the original bill might be dismissed, as against that defendant, with costs.

It was contended, in support of the motion, that by the 114th of the General Orders of the 8th of May 1845, rule 1 (4), any defendant might move to dismiss the plaintiff's bill if the plaintiff took no proceedings within a certain limited time after the defendant's answer was to be deemed sufficient; the last answer there referred to being the last answer, or last of the answers of the defendant moving to dismiss: that the great delay that had occurred could not be justified or excused by the plaintiff, and the want of Mr. Foreman's answer, who was what might be properly termed a pocket defendant, and was represented by the solicitor of the plaintiff, could not be deemed an obstacle in the way of the present application.

Mr. Heathfield, contrà, insisted that all the facts on which the present motion was founded were in existence at the date of the former motion, and within the defendant's knowledge, and ought to have been then brought forward on behalf of the defendant: that as the defendant W. G. Gray might have moved to dismiss as far back as March 1846, he was as obnoxious to the charge of delay as the plaintiff; and that the answer of the defendant Foreman was only not put in, because it might afterwards appear unnecessary to proceed with the suit, whereby expense would be saved; or if the suit did proceed, and it became necessary to amend the bill, one answer might be put in by Foreman to the original and amended bill, instead of separate answers to each of those bills.

Mr. Elderton, in reply.

The Master of the Rolls,—after observing that there had been gross delay, and mentioning the dates of the proceedings, said,—

The defendant might have moved to dismiss immediately after the middle of March 1846; and if he had done so, there might have been good reason shewn on the part of the plaintiff against any order being made on the motion; as, for instance, that one of the defendants had not put in his answer. Nothing, however, was done by either side until the 17th of December 1846. Between the time of notice of motion being given, and the morning of the day on which the motion was to be made, that is, the 21st of December 1846, an order of course was obtained to amend the bill; and the question is, whether that is an order which ought to be sustained, and if it be regular, whether the party obtaining the order may take the benefit of it to defeat

(3) 5 Sim. 553.
(4) Ord. Can. 330; 14 Law J. Rep. (N.S.) Ch. 295.

the motion to dismiss. A motion was made to discharge the order for irregularity, but I could not say that the order was irregular. The 66th of the Orders of May 1845 (5), says, one order of course for leave to amend may be obtained at any time before filing a replication, and within four weeks after the answer, or the last of several answers, is to be deemed sufficient, but no further order. An order of course has accordingly been obtained in the present case, because the last answer has not been put in; but how did it happen that that answer was not put in? Suppose a motion to dismiss the bill was made, and it was opposed on the ground that an answer had not been put in. In such cases it is always asked why the answer has not been got in. If an answer were given that was satisfactory to the Court, the consequence would be that the motion to dismiss the bill would not be granted, however regularly it might be brought forward. If, after appearance for the defendant, the plaintiff in the present case had said "I wish to amend," the question would necessarily have been, "are you entitled to an order to amend?" The answer given might be "Yes; we are in a condition to amend the bill, inasmuch as the last answer is outstanding." The reply to that would be, the outstanding answer is that of the defendant, the husband of the plaintiff (a married woman, suing by her next friend), who is under the guidance and controul of the solicitor of the plaintiff. The plaintiff here says the answer is not in, and why? because it is desired to save expense, and to file only one answer to the original and amended bill. Now, if that were the reason, the order should have been obtained at the time when the last answer was to be deemed sufficient. There is no excuse for the plaintiff's delay; and if there has been wilful delay, and the sole ground to justify an order to amend is, that the last answer has not been got in, would that have stood in the way of a motion to dismiss? I will take time to consider the case before me. It may be that there is a defect in the Orders of May 1845, in not providing for a case like the present, which seems to me very like the case of a pocket defendant, made use of by the plaintiff against the co-defendants for the purpose of delay.

(5) Ord. Can. 308; 14 Law J. Rep. (N.S.) Ch. 290.

March 23.—The MASTER OF THE ROLLS.—This was a case in which the defendant W. G. Gray put in his answer to the plaintiff's bill on the 16th of December 1845, and the six weeks after which the answer was to be deemed sufficient, and the four weeks after which the defendant was to be at liberty to move to dismiss the bill for want of prosecution, expired on the 10th of March 1846. The plaintiff is a married woman, suing by her next friend; her husband is a defendant, and has appeared by the plaintiff's solicitor, but has not put in his answer. On the 17th of December following, the defendant W. G. Gray, who had long been entitled to move to dismiss for want of prosecution, gave a notice of motion for the 21st of the same month of December. On that day the plaintiff, who had previously obtained an order of course to amend, served the order on the defendant, and produced it in court, to shew that the order to dismiss could not then be made. The defendant afterwards moved to discharge the order to amend *for irregularity*. If I could construe the words "last answer" in Order 66 and Order 16, Art. 33, to mean the last answer filed at the time of making the order to amend, the order would have been irregular, because it was made long after the time allowed within which to make it, if it were to be made within four weeks after the time when the last answer was put in. But I cannot persuade myself that it is the last answer put in which is intended by the order; it means the last answer of the last answering defendant. But at the time this order in question was made, there was an answer not put in; it therefore, perhaps erroneously, appears to me that the order of course to amend, though obtained after gross delay, was not irregular. The defendant's motion to discharge the order for irregularity having therefore failed, a motion is now made on his behalf to discharge the order obtained on another ground—viz., because it was obtained in evasion of the Orders of May, 1845. In considering orders at the Rolls, obtained as of course in causes attached to other branches of the court, it is important to distinguish irregularity in the orders so obtained, and which

alone is to be examined into in this court, from impropriety in the proceedings in other courts, grounded on the misconduct of the parties in the cause, which is not to be considered in, and is not within the jurisdiction of, this court; and to avoid the assumption of jurisdiction, it is necessary to be careful not to interfere in a cause not within the jurisdiction of this court. If this had been a cause of that kind, and within the jurisdiction of another court, I should have refused to interfere, but the cause is attached to this court, and may therefore be taken into consideration here under the Orders of May 1845. Any defendant is entitled to move to dismiss the plaintiff's bill after four weeks from the time when his answer is to be deemed sufficient; but the circumstances of his case may be such that the defendants may be entitled to move to dismiss the bill before the plaintiff is in a condition to take the next step. If the motion to dismiss be so made, the Court may, when it is being made, take into consideration the circumstances of the case, and grant further time to the plaintiff by way of indulgence, as the plaintiff may not be able to obtain justice without he is allowed to amend his bill; but the discretion thus exercised by the Court should not be so exercised as to deprive the defendant of his right to dismiss the bill, and the Court will always look into the causes of delay before granting any indulgence to the plaintiff. In this case it appears the plaintiff has not made out any title to indulgence, and it would therefore be great injustice to deprive the defendant of his right to dismiss. The delay was very great; if it were not so, the plaintiff might have appeared on the notice of motion to dismiss, accounted for the delays, and asked for leave to amend. If she had taken that course the case would have been considered, and reasonable indulgence might have been allowed to the plaintiff by giving her leave to amend; but on the evidence before me the plaintiff cannot be allowed by means of an order of course to obtain an indulgence which would not have been granted to her if applied for at the time when the motion was made to dismiss. This would be to begin a new course of litigation after wilful and unnecessary delay. I therefore discharge the order to amend, and order the amended bill to be taken off the file. plaintiff, however, undertakes to get remaining answer, and file a replicati week, the proceedings may go on, b must pay the costs of the present moti

Note.—See next case.

M.R.
March 23.
L.C.
April 30;
May 8.

ARNOLD *v.* ARNO

Amendment—16th, 66th, and 68th of May 1845—*Dismissal of Bill—Answer.*"

All the defendants who had appe the bill had answered: and the time which the plaintiff was entitled to a of course to amend, had expired, time was to be computed from the those answers. Other defendants, w within the jurisdiction, had not ap nor been served with a subpœna. plaintiff then obtained an order of co amend:—Held, that this order ou to be discharged for irregularity; Court discharged it upon the merits case, the plaintiff having taken no get an answer from the other defenda

This bill was filed against several dants, none of whom were out of risdiction. Some of them had no served with a subpœna and had n peared to the bill, but all those w been served had put in their answ last answer having been filed on the December 1846. On the 5th of 1847, notice was served on behalf the defendants who had answered, th the 10th of March a motion would b that the bill should be dismissed f of prosecution. That motion was before Vice Chancellor Wigram, t being marked for his Court, when peared that on the 6th of March, the tiff had obtained an order of course Rolls, to amend the bill; his Honour fore, allowed the motion to dismiss t over in order to give the defendants portunity of moving to discharge th to amend. On the 17th of March, a

for the discharge of that order, with costs, *for irregularity*, was made before the Master of the Rolls.

Mr. Hare, in support of the motion, cited a case of *Nigars* v. *Wetherall*, not reported, where one of three defendants had answered the bill, but the other two defendants had not answered, and it was then held that an order obtained to amend as of course was regular; it was urged also that the plaintiff had shewn no diligence in getting in the answers of the defendants, who had not appeared, and who were interested in the lands the subject-matter of the suit.

Mr. Elderton, contrà.

The MASTER OF THE ROLLS said he conceived that the words "the last answer" contained in the 33rd rule of the 16th of the orders of 8th May 1845 (1), did not mean the last of the answers which had been then filed; that he could not consider the conduct of the parties to the suit, or anything besides the alleged irregularity of the order obtained; and that he must refuse the application, but without costs. His Lordship suggested that as the Lord Chancellor might take into consideration all circumstances, and the merits of the case, if the matter were brought before him, it was probable his Lordship might discharge the order which was now made, refusing the application.

A motion, in similar terms, was now made before the Lord Chancellor, by way of appeal.

Mr. Cooper and *Mr. Hare*, in support of the application, referred to the 33rd rule of the 16th Order of May 1845 and the 67th and 68th Orders, and contended, that the words "last answer," referred to the answer which was, at the time, the last that had been put upon the file; that in this case, the "last answer" had been filed in December, and therefore the plaintiff's order to amend had been irregularly obtained. Otherwise, the plaintiff might never serve some one of the defendants with a subpœna, or omit to get in his answer, and the other defendants would never be in a situation to dismiss the bill. They cited *Dalton* v. *Hayter* (2).

Mr. Elderton, contrà, contended, that the expression "last answer," meant the last of all the answers which would be put in to the bill, otherwise the right of the plaintiff to amend might be lost, and then if another answer were put in, the plaintiff's right to amend would revive again. If any collusion existed between a plaintiff and a defendant, the Court would deal with such a case in such a manner as might be just and necessary; but in the present case, the plaintiff was regular in all his proceedings; and there was no ground for discharging the order which he had obtained at the Rolls. He cited *Foreman* v. *Gray*, decided by the Master of the Rolls on the 8th of February 1847 (3).

The following cases were also referred to—

Gully v. *Van Bodicoate*, 5 Sim. 668; s. c. 4 Law J. Rep. (N.S.) Chanc. 51.
The King of Spain v. *Hullett*, 3 Sim. 338; s. c. 8 Law J. Rep. Chanc. 8.
Cooke v. *Beetham*, 1 C.P. Cooper, 403; s. c. 8 Law J. Rep. (N.S.) Chanc. 270.

The LORD CHANCELLOR several times expressed his opinion against the construction that the "last answer" meant the last of the answers which had been then filed. But his Lordship considered that in this case none of the other defendants having been served with a subpœna, and the plaintiff having done nothing to expedite the cause, the defendants were entitled upon the merits to the order which they asked for; but that there was some difficulty, because the Court was now asked to discharge the former order, upon the ground of *irregularity*. He did not think that order was irregular; but he did think it ought to be discharged.

It was arranged between the parties, that the words, "for irregularity," should be struck out of the notice of motion, and that the order obtained at the Rolls should be discharged.

(1) Ord. Can. 287; 14 Law J. Rep. (N.S.) Chanc. 285.

(2) 7 Beav. 586; s. c. 15 Law J. Rep. (N.S.) Chanc. 33.

(3) See preceding case and Spryo v. Reynell, *post*.

M.R.
Mar. 18, 22. } HILLS v. NASH.

Witness — Co-partner — Evidence, Admissibility of.

In a suit for contribution in respect of loss sustained in a joint mercantile adventure, by one partner against other partners, and the executors of a deceased alleged partner, it is competent for the plaintiff to examine as a witness, on his behalf, one of the partners, defendant, who had been settled with and released by the plaintiff, and had also disclaimed all demand against the plaintiff and the other defendants.

For the report of this case, on appeal before the Lord Chancellor from the decision of the Master of the Rolls, on demurrer for want of parties, *vide* 15 *Law J. Rep.* (N.S.) Chanc. 107. The facts of the case are sufficiently stated in the judgment.

The record having been amended by making Sheppard and Wedd, the witnesses who had been examined for the plaintiffs, defendants thereto, the question now argued was, whether the evidence of those persons was admissible on the plaintiffs' behalf to prove their case.

An order was made on the 30th of April 1846, subsequent to the date of the former decree, giving the plaintiffs leave to read, on their behalf, the evidence already taken of Sheppard and Wedd, saving all just exceptions.

Mr. Kindersley and *Mr. W. T. S. Daniel*, for the defendants, the executors of Thomas Nash, in support of objections to the admissibility of the evidence of Sheppard and Wedd, contended, that if the then evidence in question should be held admissible, it would, in the case of A, B, & C, partners, where B. repudiated the partnership, be in the power of A, at any time, on filing his bill against B. and C, to establish the co-partnership against B, by calling C. to prove the same, and then C, in like manner, might file a bill against A. and B, and call A. to prove the partnership against B, but A. and C. could not, in such cases, say they had a right to the evidence of C. and A. respectively. If A. had entered into separate contracts with the other parties, B. and C, the case would have been a very different one; but in the present case, the agreement entered into was mutual between the three parties: and there was no case to be found in the books, where a party to a joint contract had been admitted to give evidence in favour of any of the other parties to the same contract. If such were the case, and one of the partners should happen to be a wealthy individual, it would afford great temptation to one of the other partners to say to a co-partner, I will release you, and you can then give evidence for me against our common partner; and the case was not within the act, 6 & 7 Vict. c. 85, commonly called Lord Denman's Act, because it was one of direct interest. *Carter* v. *Hawley*, in note 3 to *Nightingale* v. *Dodd*(1), was cited in support of the objection.

Mr. Roupell and *Mr. Piggott*, contrà, contended, that as the parties whose evidence was objected to had been released, and had also disclaimed, the evidence was clearly admissible in support of the plaintiffs' case; and that Nash's estate was interested only to the extent of his share in the partnership property, either for benefit or loss, as the case might be. The cases of—

Blackett v. *Weir*, 5 B. & C. 385; s. c. 4 Law J. Rep. K.B. 205.

Taylor v. *Cohen*, 4 Bing. 53; s. c. 5 Law J. Rep. C.P. 58.

Hudson v. *Robinson*, 4 Man. & Selw. 475; and

Wilson v. *Hirst*, 4 B. & Ad. 760.

were cited for the plaintiffs.

The MASTER OF THE ROLLS.—This case stood over in order that I might consider the objection which was taken to the depositions of a witness. In this suit the plaintiffs, alleging that they were engaged in a joint mercantile adventure with two defendants and a deceased person, of whom the other defendant is executor, filed their bill for the recovery of contribution for an alleged loss in the adventure. The plaintiffs propose to examine, as a witness, one of the defendants, who admits that he was a party to the adventure, but who was settled with and released by the plaintiffs, and who also disclaims all demand against the plaintiffs and the other defendants. An objection having been taken by the defendants,

(1) Ambl. 583, Blunt's edit.

the executors of the deceased person, the question is, whether the evidence ought to be received. If this were a demand against one of several partners by a person not himself a partner—a legal demand—the cases of *Blackett* v. *Weir* and *Taylor* v. *Cohen* would shew that a witness admitting himself, or proved to be a partner, might, notwithstanding his own liability, be examined at law for the plaintiff, to prove the liability of the defendant. In equity a defendant may be examined under an order having just exceptions; and the principle on which the decisions at law are founded seems to me to be applicable to this case in equity. What is the liability of the proposed witness? The plaintiffs have released him, and, moreover, have examined him; but if the plaintiffs succeed in the suit, the proposed witness may be liable to contribute to the payment, which his co-defendant may have to make; it is therefore his interest to defeat and not to support the plaintiffs' case. It is proposed to examine him against his interest; and if upon the investigation it should appear, that profit and not loss had been produced by the adventure, the witness proving the partnership must therefore prove his own liability to pay, with the other defendants, a share of profits. The question to be tried relates to the obligation of the parties under a contract, and the result of the transaction when brought to a close; and it does not appear to me, that the fact of the plaintiff having been a partner in the adventure makes any difference in the rule which has been admitted at law in cases of joint responsibility, and I therefore think it right to receive the evidence.

WIGRAM, V.C. Feb. 27. } MATTHEWS *v.* BOWLER.

Vendor and Purchaser—Vendor's Lien—Annuity.

The plaintiff, who was entitled to an equitable life interest in leasehold property, under the will of a testator, assigned the same to the defendant, in consideration of an annuity to be secured by the covenant of the purchaser; and by the same deed the purchaser covenanted for himself, his heirs, executors, and administrators, to pay the annuity, to insure and repair the premises and to observe the covenants in the lease, and to indemnify the plaintiff in respect thereof:—Held, that the plaintiff had a lien upon the premises for the annuity; and the arrears of the annuity and the costs of the plaintiff suing in formâ pauperis *were directed to be paid out of the rents of the premises.*

The testator, by his will dated in 1826, bequeathed to his trustees and executors therein named, four leasehold houses upon trust to pay the rents and profits of the same to the plaintiff for her life, for her separate use, with remainder over. The plaintiff, shortly after the testator's death, by the consent of the executors and trustees, entered into the receipt of the rents and profits of the bequeathed premises. By an indenture, dated the 28th of January 1832, made between the plaintiff on the one part, and the defendant on the other part, reciting that the plaintiff had contracted with the defendant for the sale to him of her life interest in the premises, in consideration of the sum of 15*s.* to be paid by the defendant, his heirs, executors, or administrators, to the plaintiff in each and every week during her life, it was witnessed that in consideration of the sum of 15*s.* secured to be paid to the plaintiff during her life, and for the nominal consideration therein mentioned, the plaintiff assigned all those yearly rents of 55*l.*, 26*l.*, 22*l.* and 22*l.*, and all and singular other the yearly rents which thenceforth during the life of the plaintiff should become payable to her in respect of the said several messuages (being the leaseholds bequeathed as aforesaid), and all monies then due or thereafter to become due in respect of the same rents or either or any of them, unto the said defendant, his executors administrators and assigns, thenceforth for the life of the plaintiff, to and for his and their own absolute use and benefit. And the defendant, for himself, his heirs, executors and administrators, thereby covenanted with the plaintiff, that he the defendant, his heirs, executors or administrators would pay or cause to be paid unto the plaintiff and her assigns during her life the said sum of 15*s.* weekly, and in each and every week, free from all deductions whatever; the first payment to begin and be made on the seventh day next after the day of the date

of the said indenture; and the defendant, for himself, his heirs, executors and administrators thereby further covenanted with the plaintiff, her executors, administrators and assigns, that he, the defendant, his heirs, executors or administrators, would, at his or their own cost, charge and expense, during the life of the plaintiff, insure and keep insured from loss or damage by fire, all and singular the premises thereby assigned, to their full value, and would, from time to time, produce to the plaintiff the receipts for the premiums paid; also that he, the said defendant, his heirs, executors or administrators, would, at his own cost, during the life of the plaintiff, pay or cause to be paid all ground rent reserved in respect of the said houses to the landlord, and the land tax and other taxes payable in respect of the said premises; and also when and so often as occasion should require, during the life of the plaintiff, at his and their own costs, well and sufficiently repair and keep in repair the said premises, and also during the life of the plaintiff well and sufficiently observe, perform, and keep the covenants contained in the original lease of the said premises, and on the lessee's part to be performed; and also that he or they would keep harmless and indemnify the plaintiff and the executors of the will of the original testator against the payment of the ground rent and the performance of the covenants contained in the original lease, on the lessee's part, and from all actions, &c. Upon the execution of the indenture the defendant entered into the receipt of the rent of the premises, with the assent of the plaintiff and the executors of the original testator, and continued regularly to pay the weekly sum of 15*s.* to the plaintiff up to the 22nd of March 1844, when he ceased to do so. The plaintiff thereupon filed the present bill, praying that it might be declared that the plaintiff was entitled to a lien upon the leasehold premises so assigned to the defendant in respect of the said weekly sum of 15*s.*, and that an account might be decreed to be taken of what was due and owing from the defendant in respect of the arrears of such weekly sum, and for payment of what should be found due on taking such account, and that proper directions might be given for securing the future payment of the said weekly sum. The bill also prayed an injunction to restrain the defendant from receiving the rents, and for a receiver. The defendant, by his answer, admitted the assignment of January 1832, and the payments which had been made thereunder, and stated that disputes had arisen in March 1844 between himself and the plaintiff, who had questioned the validity of the assignment and the defendant's right to receive the rents, and that it was by reason of such disputes that he had ceased to make the usual payments.

The cause coming on for hearing, the question was, whether the plaintiff had a charge upon the premises in the nature of a vendor's lien for unpaid purchase-money, or whether by the course of the transaction her rights were limited to a personal remedy against the defendant.

Mr. Whitbread, for the plaintiff, contended, that the plaintiff had a lien upon the premises assigned for the successive payments of the annuity, being the consideration or purchase-money for her life interest—*Tardiff* v. *Scrughan* (1), recognized as an authority by Sir E. Sugden in *Vendors and Purchasers*, vol. 3, 10th edit. p. 203; and he distinguished the present case from *Clarke* v. *Royle* (2), *Buckland* v. *Powell* (3), and *Parrott* v. *Sweetland* (4), inasmuch as in the present case the assignment was in consideration of the annuity, whereas in the cases cited the transfer was in consideration of a covenant to pay, a bond, and the like. The mere addition of a covenant to pay would not destroy the lien. The other covenants in the deed could only be explained on the supposition that the vendor intended to retain an interest in the premises.

Mr. J. H. Palmer, for the defendant.—The case of *Tardiff* v. *Scrughan* was indirectly overruled by Lord Eldon in *Mackreth* v. *Symmons* (5), and also in *Clarke* v. *Royle*, *Buckland* v. *Pocknell*, and *Parrott* v. *Sweetland*. The covenants in the deed by the purchaser being for himself, his heirs, executors, and administrators, omitting the word "assigns," rather rebut the presumption of a lien. The observations

(1) Cited in 1 Bro. C.C. 423.
(2) 3 Sim. 499.
(3) 13 Ibid. 406.
(4) 3 Myl. & K. 655.
(5) 15 Ves. 336.

also of Lord Lyndhurst, in *Winter* v. *Lord Anson* (6), imply a doubt whether the lien would have existed in case the consideration had been an annuity.

WIGRAM, V.C.—I am of opinion that there is sufficient ground in this case to hold that the lien subsists. It is not possible otherwise to understand why the covenants to insure and repair should have been reserved in the deed of assignment, when the plaintiff had only an equitable interest, and was not liable upon the covenants in the original lease. Declare that the plaintiff is entitled to a lien upon the premises for the arrears of the annuity with costs of the suit; and let it be referred to the Master to take an account of what is due to the plaintiff in respect of the arrears of the annuity, and to tax the costs of the suit; and that what shall be found due in respect of such arrears and costs be paid out of the rents of the premises, and that the receiver be continued in the mean time, with liberty to apply.

WIGRAM, V.C. Jan. 20. } WOLFE v. FINDLAY.

Principal and Agent—Interest.

In 1827, *the administratrix of an intestate, who had carried on business at Calcutta, sent out letters of attorney to C. & Co., to collect the assets in India. C. & Co. collected the assets and remitted the proceeds in* 1829 *to B. & Co., their correspondents in London, with directions to pay the same to the administratrix upon having a proper discharge. The letters of administration being insufficient, B. & Co. refused to pay over the money. On a bill filed by the next-of-kin against the administratrix and B. & Co., an injunction was obtained restraining the administratrix from collecting the assets and B. & Co. from paying over the fund. B. & Co. by their answer admitted the possession of the fund, and offered to pay it, upon being indemnified. No further steps were taken in the suit until* 1841, *when a bill of revivor and supplement was filed, and under an order in the cause the fund, minus the expenses, was paid into court, without prejudice to the question of interest. Since* 1829 *the fund had been lying at the bankers of B. & Co. mixed up with other monies of the firm :—Held, that B. & Co. were merely the agents of C. & Co., and no demand having been made by a person competent to give a discharge, B. & Co. were not liable to pay interest on the fund in their hands; and that B. & Co. were in no default in not themselves applying to pay the fund into court, there being no personal representative, properly constituted, before the Court.*

In 1825, W. Parkins, who had for some time carried on business as a coach-builder at Calcutta, set out on his return to England, but died on his passage home, intestate, leaving a considerable personal estate in India. In 1827, Isabella Findlay, the sister of the intestate, took out letters of administration to the intestate, and soon afterwards sent out to the firm of Colvin & Co. in Calcutta a power of attorney to collect the assets of the intestate. The firm in India collected the assets, and remitted the money by bills to the firm of Bazett & Co., their correspondents in London. In 1830 a bill was filed by some of the next-of-kin of the intestate to restrain Isabella Findlay and her husband from getting in the assets of the intestate, and to this bill the Messrs. Bazett & Co. were made defendants, and the bill prayed that they might be restrained by injunction from paying over the money in their hands to Mrs. Findlay. In March 1830 an order for the injunction was made, and in April 1830 Messrs. Bazett & Co. put in their answer to the bill; by which, after admitting that a power of attorney had been sent out to the firm of Colvin & Co., and that Colvin & Co. had accordingly got in such assets to a considerable amount, and had remitted such part thereof as thereinafter mentioned to the defendants, that is to say, "the said firm of Colvin & Co. have remitted to these defendants two bills of exchange, one for 1,931*l.* 5*s.* 8*d.* drawn upon Bazett & Co, payable at six months after date, and which became due on the 9th of November 1829; and the other for 54*l.* 3*s.* 4*d.* drawn upon the East India Company, and made payable to the said Isabella Findlay, and which became due on the 3rd of October 1829, but

(6) 3 Russ. 492; s. c. 6 Law J. Rep. (Chanc.) 7.

is now in these defendants' hands unreceived, the same not having been indorsed by the said Isabella Findlay; and these defendants say that the said bills do not bear interest. And further that they received the said two bills from the said Messrs. Colvin & Co. with directions to pay over the proceeds to the said administratrix of the said W. D. Parkins upon having a proper discharge for the same; and inasmuch as it appeared that the letters of administration, which had been granted to her without stamp, were not sufficient to enable her to give a discharge to these defendants and the said Messrs. Colvins, these defendants refused to pay over the amount of the said bills; and in order to enable the said Geo. Findlay and Isabella his wife to pay the stamp upon proper letters of administration, they advanced to them out of the said bill for 1,931*l.* 5*s.* 8*d.* the sum of 100*l.* for that purpose, at the request and entreaty of them, the said Geo. Findlay and Isabella his wife; but these defendants have since heard that the said Geo. Findlay and Isabella his wife have misapplied the said sum so paid them as aforesaid. And these defendants say that the sum payable to them as East India agents, by way of commission, in respect of the aforesaid remittances, and the law charges which they, these defendants, have incurred in respect of the said bills, amount to 30*l.* 11*s.* 6*d.*, which, together with the said 100*l.*, being deducted from the said bill of 1,931*l.* 5*s.* 8*d.*, leaves a balance in their hands of 1,800*l.* 14*s.* 2*d.*, which said balance, together with the said bill on the East India Company, for 54*l.* 3*s.* 4*d.*, these defendants are ready to pay into court, or to dispose of as this Court shall direct, upon being indemnified and paid their costs." In August 1841, no further step being taken in the suit in the mean time, a bill of revivor and supplement was filed; and in November following, under an order of the Court, the sum of 1,766*l.* 1*s.* 6*d.*, the amount received upon the bill, after deducting expenses, &c., was paid into court by the surviving members of the firm of Bazett & Co., but without prejudice to any question of interest or any other question in the cause. It appeared that since 1829 the money had been deposited with the bankers of Bazett & Co., mixed up with the other monies of the firm. Upon the hearing, the question was raised, whether the Messrs. Bazett were liable to pay interest on this sum, which had been so lying in their hands since 1829, and had been mixed up with their own monies.

Mr. Romilly, *Mr. Wood*, *Mr. Malins*, *Mr. Bagshawe*, *Mr. Hubback*, *Mr. Willcock*, *Mr. Goldsmith*, and *Mr. Moxon*, appeared for the various parties to the suit.

The cases cited were—

Lord Salisbury v. *Wilkinson*, cited in the judgment in *Chedworth* v. *Edwards*, 8 Ves. 48.
Edwards v. *Vere*, 5 B. & Ad. 282; s. c. 2 Law J. Rep. (N.S.) K.B. 190.
Wright v. *Southwood*, 1 You. & Jer. 527.
Treves v. *Townshend*, 1 Bro. C.C. 384.
Newton v. *Bennet*, Ibid. 359.
Perkins v. *Baynton*, Ibid. 375.
Browne v. *Southouse*, 3 Ibid. 107.

WIGRAM, V.C.—I do not think that the circumstance that the house in India departed from the authority given to them by Mrs. Findlay will affect the house in London; with that they had nothing to do; but having received the money, as agents for the firm in India, accompanied by a direction to apply it in a particular manner, they were bound to comply with that direction. Their instructions were to pay it to the person who could give a legal discharge; and such payment was, of course, to be preceded by a demand. No such application had been made, for Mrs. Findlay was not the party entitled; and there is no rule of law which renders the agent liable for interest until demand. Supposing the delay to have arisen from the neglect of a duly qualified administrator, although such administrator might have been liable to those to whom he was accountable, it by no means follows that the agent would have been liable to him. The question was, what were the liabilities incurred by the London firm, in consequence of the undertaking they had come under? The undertaking was to pay over the money upon demand to the party entitled; and to do that, the agents were bound to have the money ready. Had it been invested in the securities recognized by the Court, a fall in the

funds would have been no answer to the party applying for the full amount. That being so, I cannot think that the parties in the suit can have any right as against the London firm, which an administrator himself would not have had; nor does it appear that the firm, who had offered, in their answer, to pay the money into court upon being indemnified, were in default for not having themselves applied to do so, in a suit in which there was no legal personal representative, properly constituted, before the Court. In a case like the present, where there has been no administrator of the intestate, and no proper hand to receive the money until 1842, the defendants Bazett & Co., cannot be held liable for interest upon the fund which has been left in their hands.

L. Bruce, V.C. 1846. Jan. 17, 19, 31; Dec. 16. } JAQUES *v.* CHAMBERS.

Legacy—Railway Shares.

A testator bequeathed some Great Western Railway shares, in respect of which he had executed the parliamentary contract, and also some Great Western Railway shares which he had purchased before the act passed from a person who had subscribed the contract. All the calls on these shares had not been paid at the time of the testator's death:—Held, that, as between the testator's estate and the legatee, the testator's estate was liable to pay the future calls on both sets of shares.

This case is reported in 15 *Law J. Rep.* (N.S.) Chanc. 225; s. c. 2 *Coll.* 435. It is there stated that the question whether, as between the testator's estate and the legatees, the testator's estate was liable to pay the calls on the purchased shares was decided; and that the question whether, as between the testator's estate and the legatees, the testator's estate was liable to pay the calls on the shares originally subscribed for was not decided, and that it was to be left to the decision of the Lord Chancellor upon a re-hearing.

It appeared, however, by the decree, as drawn up, that both questions were reserved.

By consent of the parties the intention of re-hearing the cause before the Lord Chancellor was abandoned; and the same questions were brought before the Court on a petition presented in the cause.

The facts upon which the opinion of the Court was now desired were as follows:—

The testator in the cause bequeathed thirty Great Western Railway shares to trustees on certain trusts, and thirty other shares to another legatee. The testator at his death was possessed of fifty shares, for which he had originally subscribed; and seventy shares, which he had purchased from an original subscriber before the Great Western Railway Act was passed. All the calls on the shares had not been paid, and, at the testator's death, each of them was liable to a call of 20*l.* Twenty-five of the shares originally subscribed for and five of the purchased shares were appropriated to the trustees; and the remaining shares originally subscribed for and five others of the purchased shares were appropriated to the other legatee.

The questions were, first, whether the testator's estate was liable to pay the future calls on the shares originally subscribed for, for the benefit of his legatees: and, secondly, whether it was liable to pay the future calls on the purchased shares for the benefit of his legatees.

The testator executed the parliamentary contract, which was dated on the 17th of February 1835. By this instrument, it is witnessed that the several persons, parties thereto, did thereby respectively acknowledge and declare that they had subscribed the several sums set opposite to their respective names for the purpose of making and establishing a railway (describing it); the same to be made in such manner as should be provided for by act of parliament, to be applied for, &c.; and (after giving certain powers to the committee) the instrument contained a further witnessing part, by which the several parties thereto did covenant to pay the amount subscribed by them respectively, within ten years from the date thereof, in such sums and at such times and places as, until the passing of the act, should be required by the directors for the time being engaged in the conducting of the said undertaking, and, after the passing of the act or acts, as the directors

authorized by the act or acts should direct or appoint.

The Great Western Railway Act (5 & 6 Will. 4. c. cvii.) was passed in August 1835. By the 151st section of this act it was enacted that the subscribers towards the undertaking should pay the sums respectively subscribed for, or such parts as should from time to time be called for by the directors, at such times and places, and to such persons, as should be directed by the directors; and, in case of neglect or refusal, the directors should have power to sue for and recover the same in any court of law or equity.

By the 153rd section the directors were authorized from time to time to make such calls as they from time to time should find necessary; and, if any owner or proprietor for the time being of any share should neglect or refuse to pay, power was given to the company to sue for and recover the same in any of his Majesty's courts of record; or the directors might declare the shares to be forfeited, and order such shares to be sold.

By the 158th section it was made lawful for the several proprietors of shares and their respective executors, &c. to sell and dispose of any shares to which they should be entitled, subject to the rules mentioned in the section; one of which was, that the clerk of the company should enter a memorial of the transfer and sale in a book to be kept for that purpose; and, until such memorial should be made and entered, the seller should remain and be held liable for all future calls.

Mr. J. Russell and *Mr. Selwyn*, *Mr. Wigram* and *Mr. Nevinson*, *Mr. Stinton* and *Mr. Rolt*, appeared for the different parties.

The following cases were cited:—

Blount v. *Hipkins*, 7 Sim. 43, 51; s.c. 4 Law J. Rep. (N.S.) Chanc. 13.
Fyler v. *Fyler*, 2 Rail. Cases, 813; s.c. 11 Law J. Rep. (N.S.) Chanc. 128.

KNIGHT BRUCE, V.C.—The first question is as to the construction of the instrument which is called the parliamentary undertaking, and which appears to me to be a deed. It has been contended that the covenant, mentioning the term of ten years, did not create any liability after the end of ten years, if the money should not be paid within these ten years. That covenant, however, awkwardly worded as it may be, cannot be read alone. The whole instrument must be read together. At the outset, I find a declaration by the parties that each of them had subscribed so much to the undertaking. Taking the whole together, I must consider that, according to the true construction of the instrument, the covenant was an absolute covenant to pay the money within ten years, at such times as should be appointed, and that it was not a covenant to pay within the ten years, with a direction that, if the money was not paid in ten years, it should not be paid at all. I think, therefore, that there was an absolute obligation to pay the money.

I stated, some time back, that, if any of the parties wished it, they might have the opinion of a court of law on the construction of the covenant; and I have now no objection to direct such a case for the opinion of a court of law. As, however, all parties wish to have an opinion from me, I now give that opinion.

The next question is, whether, according to the true construction of the act of parliament (having regard particularly to the clauses to which my attention has been directed), the parties who executed the deed were relieved by the act from the liability which they had incurred in respect of the deed. I am of opinion that there is nothing in any one of the clauses which have been brought to my attention to take away that liability, referring only to the liability created by the original covenant. If I am right in that view, the testator, as between himself and the company, was personally liable at his death; and his estate became immediately afterwards liable to the company in respect of these shares, however they might be bequeathed.

Assuming this to be so, I am unable to distinguish the twenty-five (1) shares originally subscribed for by the testator in this case, from the shares which were the subject of the judgment in *Blount* v. *Hipkins*—a case, in assenting to which I confess I have felt some difficulty, but from which, decided as it was by a Judge of great learning and

(1) The shares appropriated to the trustees.

the motion to dismiss. A motion was made to discharge the order for irregularity, but I could not say that the order was irregular. The 66th of the Orders of May 1845 (5), says, one order of course for leave to amend may be obtained at any time before filing a replication, and within four weeks after the answer, or the last of several answers, is to be deemed sufficient, but no further order. An order of course has accordingly been obtained in the present case, because the last answer has not been put in; but how did it happen that that answer was not put in? Suppose a motion to dismiss the bill was made, and it was opposed on the ground that an answer had not been put in. In such cases it is always asked why the answer has not been got in. If an answer were given that was satisfactory to the Court, the consequence would be that the motion to dismiss the bill would not be granted, however regularly it might be brought forward. If, after appearance for the defendant, the plaintiff in the present case had said "I wish to amend," the question would necessarily have been, "are you entitled to an order to amend?" The answer given might be "yes; we are in a condition to amend the bill, inasmuch as the last answer is outstanding." The reply to that would be, the outstanding answer is that of the defendant, the husband of the plaintiff (a married woman, suing by her next friend), who is under the guidance and controul of the solicitor of the plaintiff. The plaintiff here says the answer is not in, and why? because it is desired to save expense, and to file only one answer to the original and amended bill. Now, if that were the reason, the order should have been obtained at the time when the last answer was to be deemed sufficient. There is no excuse for the plaintiff's delay; and if there has been wilful delay, and the sole ground to justify an order to amend is, that the last answer has not been got in, would that have stood in the way of a motion to dismiss? I will take time to consider the case before me. It may be that there is a defect in the Orders of May 1845, in not providing for a case like the present, which seems to me very like the case of a pocket defendant, made use of by the plaintiff against the co-defendants for the purpose of delay.

(5) Ord. Can. 308; 14 Law J. Rep. (N.s.) Ch. 290.

March 23.—The MASTER OF THE ROLLS.—This was a case in which the defendant W. G. Gray put in his answer to the plaintiff's bill on the 16th of December 1845, and the six weeks after which the answer was to be deemed sufficient, and the four weeks after which the defendant was to be at liberty to move to dismiss the bill for want of prosecution, expired on the 10th of March 1846. The plaintiff is a married woman, suing by her next friend; her husband is a defendant, and has appeared by the plaintiff's solicitor, but has not put in his answer. On the 17th of December following, the defendant W. G. Gray, who had long been entitled to move to dismiss for want of prosecution, gave a notice of motion for the 21st of the same month of December. On that day the plaintiff, who had previously obtained an order of course to amend, served the order on the defendant, and produced it in court, to shew that the order to dismiss could not then be made. The defendant afterwards moved to discharge the order to amend *for irregularity*. If I could construe the words "last answer" in Order 66 and Order 16, Art. 33, to mean the last answer filed at the time of making the order to amend, the order would have been irregular, because it was made long after the time allowed within which to make it, if it were to be made within four weeks after the time when the last answer was put in. But I cannot persuade myself that it is the last answer put in which is intended by the order; it means the last answer of the last answering defendant. But at the time this order in question was made, there was an answer not put in; it therefore, perhaps erroneously, appears to me that the order of course to amend, though obtained after gross delay, was not irregular. The defendant's motion to discharge the order for irregularity having therefore failed, a motion is now made on his behalf to discharge the order obtained on another ground—viz., because it was obtained in evasion of the Orders of May, 1845. In considering orders at the Rolls, obtained as of course in causes attached to other branches of the court, it is important to distinguish irregularity in the orders so obtained, and which

alone is to be examined into in this court, from impropriety in the proceedings in other courts, grounded on the misconduct of the parties in the cause, which is not to be considered in, and is not within the jurisdiction of, this court; and to avoid the assumption of jurisdiction, it is necessary to be careful not to interfere in a cause not within the jurisdiction of this court. If this had been a cause of that kind, and within the jurisdiction of another court, I should have refused to interfere, but the cause is attached to this court, and may therefore be taken into consideration here under the Orders of May 1845. Any defendant is entitled to move to dismiss the plaintiff's bill after four weeks from the time when his answer is to be deemed sufficient; but the circumstances of his case may be such that the defendants may be entitled to move to dismiss the bill before the plaintiff is in a condition to take the next step. If the motion to dismiss be so made, the Court may, when it is being made, take into consideration the circumstances of the case, and grant further time to the plaintiff by way of indulgence, as the plaintiff may not be able to obtain justice without he is allowed to amend his bill; but the discretion thus exercised by the Court should not be so exercised as to deprive the defendant of his right to dismiss the bill, and the Court will always look into the causes of delay before granting any indulgence to the plaintiff. In this case it appears the plaintiff has not made out any title to indulgence, and it would therefore be great injustice to deprive the defendant of his right to dismiss. The delay was very great; if it were not so, the plaintiff might have appeared on the notice of motion to dismiss, accounted for the delays, and asked for leave to amend. If she had taken that course the case would have been considered, and reasonable indulgence might have been allowed to the plaintiff by giving her leave to amend; but on the evidence before me the plaintiff cannot be allowed by means of an order of course to obtain an indulgence which would not have been granted to her if applied for at the time when the motion was made to dismiss. This would be to begin a new course of litigation after wilful and unnecessary delay. I therefore discharge the order to amend, and order the amended bill to be taken off the file. If the plaintiff, however, undertakes to get in the remaining answer, and file a replication in a week, the proceedings may go on, but she must pay the costs of the present motion.

Note.—See next case.

M.R. March 23. L.C. April 30; May 8. } ARNOLD *v.* ARNOLD.

Amendment—16th, 66th, and 68th Orders of May 1845—*Dismissal of Bill—"Last Answer."*

All the defendants who had appeared to the bill had answered: and the time within which the plaintiff was entitled to an order of course to amend, had expired, if such time was to be computed from the last of those answers. Other defendants, who were within the jurisdiction, had not appeared, nor been served with a subpœna. The plaintiff then obtained an order of course to amend:—Held, that this order ought not to be discharged for irregularity; but the Court discharged it upon the merits of the case, the plaintiff having taken no steps to get an answer from the other defendants.

This bill was filed against several defendants, none of whom were out of the jurisdiction. Some of them had not been served with a subpœna and had not appeared to the bill, but all those who had been served had put in their answers, the last answer having been filed on the 5th of December 1846. On the 5th of March 1847, notice was served on behalf of all the defendants who had answered, that upon the 10th of March a motion would be made that the bill should be dismissed for want of prosecution. That motion was made before Vice Chancellor Wigram, the bill being marked for his Court, when it appeared that on the 6th of March, the plaintiff had obtained an order of course, at the Rolls, to amend the bill; his Honour, therefore, allowed the motion to dismiss to stand over in order to give the defendants an opportunity of moving to discharge the order to amend. On the 17th of March, a motion

for the discharge of that order, with costs, *for irregularity*, was made before the Master of the Rolls.

Mr. Hare, in support of the motion, cited a case of *Nigars* v. *Wetherall*, not reported, where one of three defendants had answered the bill, but the other two defendants had not answered, and it was then held that an order obtained to amend as of course was irregular; it was urged also that the plaintiff had shewn no diligence in getting in the answers of the defendants, who had not appeared, and who were interested in the funds the subject-matter of the suit.

Mr. Elderton, contrà.

The MASTER OF THE ROLLS said he conceived that the words "the last answer" contained in the 33rd rule of the 16th of the Orders of 8th May 1845 (1), did not mean the last of the answers which had been then filed; that he could not consider the conduct of the parties to the suit, or anything besides the alleged irregularity of the order obtained; and that he must refuse the application, but without costs. His Lordship suggested that as the Lord Chancellor might take into consideration all circumstances, and the merits of the case, if the matter were brought before him, it was probable his Lordship might discharge the order which was now made, refusing the application.

A motion, in similar terms, was now made before the Lord Chancellor, by way of appeal.

Mr. Cooper and *Mr. Hare*, in support of the application, referred to the 33rd rule of the 16th Order of May 1845 and the 66th and 68th Orders, and contended, that the words "last answer," referred to the answer which was, at the time, the last that had been put upon the file; that in this case, the "last answer" had been filed in December, and therefore the plaintiff's order to amend had been irregularly obtained. Otherwise, the plaintiff might never serve some one of the defendants with a subpœna, or omit to get in his answer, and the other defendants would never be in a situation to dismiss the bill. They cited *Dalton* v. *Hayter* (2).

Mr. Elderton, contrà, contended, that the expression "last answer," meant the last of all the answers which would be put in to the bill, otherwise the right of the plaintiff to amend might be lost, and then if another answer were put in, the plaintiff's right to amend would revive again. If any collusion existed between a plaintiff and a defendant, the Court would deal with such a case in such a manner as might be just and necessary; but in the present case, the plaintiff was regular in all his proceedings; and there was no ground for discharging the order which he had obtained at the Rolls. He cited *Foreman* v. *Gray*, decided by the Master of the Rolls on the 8th of February 1847 (3).

The following cases were also referred to—

Gully v. *Van Bodicoate*, 5 Sim. 668; s. c. 4 Law J. Rep. (N.S.) Chanc. 51.
The King of Spain v. *Hullett*, 3 Sim. 338; s. c. 8 Law J. Rep. Chanc. 8.
Cooke v. *Beetham*, 1 C.P. Cooper, 403; s. c. 8 Law J. Rep. (N.S.) Chanc. 270.

The LORD CHANCELLOR several times expressed his opinion against the construction that the "last answer" meant the last of the answers which had been then filed. But his Lordship considered that in this case none of the other defendants having been served with a subpœna, and the plaintiff having done nothing to expedite the cause, the defendants were entitled upon the merits to the order which they asked for; but that there was some difficulty, because the Court was now asked to discharge the former order, upon the ground of *irregularity*. He did not think that order was irregular; but he did think it ought to be discharged.

It was arranged between the parties, that the words, "for irregularity," should be struck out of the notice of motion, and that the order obtained at the Rolls should be discharged.

(1) Ord. Can. 287; 14 Law J. Rep. (N.S.) Chanc. 285.

(2) 7 Beav. 586; s. c. 15 Law J. Rep. (N.S.) Chanc. 33.

(3) See preceding case and Spryo v. Reynell, *post*.

the children in the same way that the testatrix's mother had acted during her lifetime to all the testatrix's children, inclusive of the eldest daughter; and that it was only by inference that the eldest child was to have a preference over the younger ones in the enjoyment of the legacy.

The MASTER OF THE ROLLS was of opinion that the testatrix only intended to dispose of the interest of the fund in the ordinary acceptance of the term, and that life interests only in the fund were by the testatrix intended to be enjoyed by the children in succession, and according to priority of birth. His Lordship added, that when the youngest of the children attained his age of twenty-one, an easy way would be found of disposing of the fund if they agreed. The order accordingly directed payment of the dividends to the petitioner for his life, with liberty for any party to apply on his death.

V.C. Jan. 29; Feb. 10. } LUDGATER *v.* CHANNELL.

Receiver—Recognizance.

It is not the practice of the Court to order a receiver's recognizance to be put in suit against the surety, where it does not appear from the Master's report that a definite sum is due.

No actual balance having been found due from the receiver, the Court refused to decree an account against his administratrix.

The bill, in this case, was filed on the 11th of March 1829, by James Ludgater, for the administration of the estate of Henry Taylor. The plaintiff was appointed guardian of the children of the testator. By an order in the cause, dated the 26th of March 1832, William Lancaster was appointed receiver of the estate, and the Rev. Edward Manners and Walter Manners became sureties for the said W. Lancaster, and entered into recognizances in the sum of 15,000*l.* The children of the testator now presented their petition, stating that the Master, by his report in the suit, dated the 6th of August 1841, certified that, in pursuance of an order dated the 26th March 1832, the said W. Lancaster, the receiver, caused to be laid before him, on the 5th of August then instant, an account of the personal estate of the said testator, outstanding at the time of his said appointment, and that he had inspected the said account, and it appeared that personal estate, to an extent of upwards of 13,000*l.*, had been collected and got in by the said W. Lancaster, and that there was a balance of 9,000*l.* and upwards due from him in respect thereof; and as some time might elapse before the said account would be finally examined and passed before him, the said Master appointed the said W. Lancaster, within seven days from the date of his report, to pay 7,000*l.* into the Bank of England to the credit of this cause; that the said 7,000*l.* was accordingly, on the 10th of August 1841, paid by the said W. Lancaster into the bank to the credit of the cause; that the Master, by another report, dated the 22nd of November 1842, certified that various sums had subsequently been collected by the receiver, in respect of the personal estate of the testator, and that a large balance, exceeding 6,000*l.*, then remained due on account thereof, and the said Master thereby appointed the said W. Lancaster, within seven days from the date of his report, to pay the said 6,000*l.* into the bank to the credit of the cause; that the said 6,000*l.* was duly paid inas directed; that by another report, dated the 17th of December 1842, the Master, after finding the several sums which had been paid to, or on account of, the petitioners, found that the residue of the testator's estate consisted o 6,319*l.* cash, standing to the credit of th cause, and the sum of 350*l.* due from Job Reynolds, and a small balance in the han of the receiver, and the Master there apportioned the said sum of 6,319*l.* amon the several plaintiffs in manner therein forth. By an order of the Court, dated 22nd of December 1842, it was ord that the receiver should pay the bal reported due from him, as well as money which ought to be received b in respect of the said debt of 350*l.* a terest, due from the said J. Reynolds, petitioners in the shares therein men and it was ordered that the said W caster, the receiver, upon such being made, should be discharged, he should be at liberty to apply to

recognizances, entered into by him and his sureties as such receiver, vacated. The petition then stated that the aforesaid report as to the residue was incorrect, and that the balance in the receiver's hands at the date of the report was not a small balance, but the same exceeded the sum of 1,000*l.*; that no payment had been made by, or on behalf of, the said W. Lancaster to the petitioners, in respect of the said balances in the hands of the said receiver; that the inquiry directed by the Master, as to getting in the debt due from the said J. Reynolds, was never prosecuted; that the said receiver never passed the aforesaid account, or any other account, of his receipts and payments in respect of the said outstanding personal estate of the testator, and he died on or about the 16th of January 1846, intestate; that the said receiver, by his omission to account for the sums which he had so as aforesaid received in respect of the outstanding personal estate, made breaches of the condition of the aforesaid recognizance, whereby the penalty thereof became forfeited and recoverable by, or on behalf of, the petitioners; that letters of administration to the said W. Lancaster were, on the 16th of March 1846, granted to Mary Lancaster, his widow. The petition then set forth at great length a number of statements respecting the accounts, for the purpose of shewing that there were incorrect statements upon those taken in before the Master; and it stated that the said E. Manners and W. Manners, the sureties of the said W. Lancaster, insisted that they were not liable to make good any loss or deficiency which might result to the petitioners in respect of any breaches by the said receiver in the condition of the recognizance, and that the petitioners were not entitled to put in suit against them the aforesaid recognizance. The petition prayed that the petitioners might be at liberty to put in suit the said recognizance against the said Mary Lancaster, as the administratrix of the receiver, W. Lancaster, and against the said E. Manners and W. Manners, and that the said Mary Lancaster, the administratrix of the said receiver, might be ordered forthwith to pass the accounts respecting the said testator's estate.

Mr. Anderdon and *Mr. T. Parker, sen.*, in support of the petition, contended that the recognizance ought to be put in suit against the sureties. It appeared by the Master's report that a sum of money was due from the receiver; but, the amount not being stated, the further accounts ought to be taken and the amount ascertained. The following cases were cited:—

Creighton v. *Rankin*, 7 Cl. & Fin. 325.
Littleboy v. *Spooner*, Reg. Lib. B, 1825, fol. 1516, and *Seton on Decrees*, p. 331.

Mr. Cooper and *Mr. Tennant* appeared for the representative of the receiver; and *Mr. Rolt* and *Mr. Whatley*, for other parties, and contended, that there was no case in which the recognizance had ever been put in suit against a surety, unless the balance actually due from the receiver had been found by the Master, but that the contrary practice had always been pursued; and that in the case of *Littleboy* v. *Spooner*, the decree was made with the consent of counsel. The case of *Jenkins* v. *Briant* (1) was also opposed to the petition.

The Vice Chancellor.—What I intend to do is this:—I will have the matter examined into, whether it has been the practice of the Court to make an order of this kind without its distinctly appearing by the report of the Master, in proceedings to which the receiver was a party, what was the balance actually due; for that is, in fact, the only question before me. The matter stands thus:—two reports only, as I understand, have been made on the receiver's accounts upon proceedings in the Master's office, to which the receiver was, or might have been, a party. The first report was made on the 6th of August 1841; and there the Master states, "That in pursuance of the order appointing a receiver, he had been attended by the solicitor for the plaintiffs and the defendants, and by the agent for W. Lancaster, who had been appointed receiver." And then he states, "That the receiver caused to be laid before him an account of the receipts respecting the estate outstanding," which he was to collect: he was not a receiver for the sums from time to time, but a receiver of the outstanding personal estate; "and it appeared therefrom that the personal estate, to an extent

(1) 7 Sim. 171; s.c. 4 Law J. Rep. (N.S.) Chanc. 2.

of upwards of 13,000*l.*, had been collected and got in by the said W. Lancaster, and that there was a balance of 9,000*l.* and upwards due from him in respect thereof; and as some time might elapse before the accounts would be finally settled and passed" he appointed him, before a certain time, to pay in a sum of 7,000*l.* It appears, by a statement on this petition, that that sum was paid in on the 10th of August 1841. Then the next report—in fact, the only other report respecting the receivership—is dated the 22nd of November 1842; and there the Master, after taking notice of the former proceedings, and of the direction to pay the sum of 7,000*l.*, goes on to say, that it being represented to him that other sums of money, since the 6th of August 1841, had been collected and got in by the said W. Lancaster in respect of the said personal estate, and that a balance, exceeding 6,000*l.*, then remained due on account thereof, the Master thereby appointed W. Lancaster, within seven days from that report, to pay the sum of 6,000*l.* into the Bank. The precise day on which it was paid does not appear in the petition, but it does appear on the petition that it was paid according to the directions of the report. Now, it is very remarkable that the Master does not state that he has exercised his judgment on any subsequent accounts; but he states, that it being represented to him that other sums had been received, and that a balance was left, exceeding 6,000*l.*, and then remained due, therefore he ordered W. Lancaster to pay in such a sum. Now, it appears to me that the fair meaning of that is, that the Master came to a conclusion that a balance would remain in the receiver's hands after the payment of the 6,000*l.*, and that was, in effect, admitted, because the receiver acted upon the order to pay in the 6,000*l.* Now, it appears to me the utmost that amounts to is this—that, according to the representation of the parties themselves, there would be a balance other than the 6,000*l.* That is the whole of the case at present against the receiver; and then the question will be, whether it is the habit of the Court to direct the recognizance to be estreated, either where there has been no report made or no report of what is definitely due, because it may be true that there is something due, perhaps only 5*s.*, and still it might be very advantageous to the estate to have the accounts taken, in order that the thing might be finally settled. I shall have the most careful inquiry made, whether it is the practice of the Court to order the recognizance to be estreated where it does not appear by the Master's report that any definite sum is due: the consequence of such a course would be that either the recognizances would be estreated in the first instance, or that there would be an attempt made to take the receiver's accounts before a jury, which, I apprehend, the Court will not allow, because this Court never allows a court of common law to interfere with its own personal jurisdiction to ascertain what is due from one of its officers: and if the Court cannot do that, the consequence will be, that the cognizee, if I may use the expression, may help himself *ad libitum;* and that, I conceive, would be contrary to justice; and therefore it seems to me that there is some difficulty in principle in making such an order as is asked by the petition, under the circumstances of the case; still, if it has been the practice to do so, the Court will be bound by the practice. The matter must, therefore, stand over until I have made inquiries as to the practice.

Feb. 10.—The Vice Chancellor.—In this case, the petition, after stating a great number of circumstances, asks that the petitioners may be at liberty to put the recognizance into execution against Mary Lancaster, as the administratrix of the late W. Lancaster, and then it asks that she may be decreed to pass the accounts. Now, it was said, that a petition in this form was not authorized by the practice of the Court. I therefore wrote to Mr. Wood, who has given me this statement: He says, "with regard to the question whether it has been the practice of the Court to order a receiver's recognizance to be put in suit where it does not appear from the Master's report that a definite sum is due, the registrars know of no case, nor can they find one, in which the recognizance has been put in suit against the sureties, in default of the receiver paying what may be due from him, without the amount being first ascertained, except where the receiver has absconded; and they conceive, that a breach of the recogni-

zance, by non-payment of a balance reported due from a receiver, ought to be shewn as a ground for granting an application for liberty to put the recognizance in suit, which opinion also prevails in the Petty-Bag office, where these proceedings are instituted, as no case is found to the contrary, and such is also the practice in lunacy." This appears to me to be conclusive upon the question. And with respect to the point which was rather faintly urged as to decreeing an account against the administratrix, I have read very carefully the order which was made in *Littleboy* v. *Spooner*, and it appears to have been made with the consent of counsel for the plaintiff, that the receiver's account was taken; and in the case of *Mead* v. *Lord Orrery* (2) it does not appear that this question before me arose; but it seems that Lord Hardwicke made the order, on the presumption that there was no such question. I think, therefore, the petition must be dismissed, with costs.

K. Bruce, V.C. Feb. 25; March 5. } COLLIS *v.* ROBINS.

Will—Construction—Charge of Debts on Real Estate in Exoneration of Personal Estate.

A testator devised all his real estate to trustees in trust to sell; and directed them to stand possessed of the purchase monies, in the first place, to pay all debts due from him at his decease, and then to retain all costs, charges, and expenses attending the execution of the trusts, and then to pay a legacy of 500l. to a daughter of his heir-at-law, and to invest 500l. for the benefit of C. for life, and after her decease for D. And as to all his ready money and securities for money, and all other his personal estate, he gave the same to D. He declared that the trustees should be allowed to retain to themselves all charges and expenses they might be put unto in the execution of his will, or in relation thereto; and appointed his trustees to be his executors. He did not give any legacy to his heir:—Held, first, that the produce of the real estate, after paying the charges which ought to be imposed on it, was undisposed of, and went to the heir:—and, secondly, that the testator's debts were not thrown on the real estate, in exoneration of the personal estate.

Thomas Collis, by his will, dated the 13th of May 1845, devised to John Robins and Benjamin Robins, all his real estate, upon trust to sell the same; and directed them to stand possessed of the monies to arise therefrom, and from the rents and profits thereof until sale, upon trust, "in the first place to pay and satisfy all debts due and owing from him at the time of his decease to any person or persons whomsoever;" and then upon trust to pay and retain to themselves or himself "all costs, charges, and expenses, attending the execution of the trusts thereby created, or in relation thereto;" and then upon trust to pay unto each of his two nieces, Maria Downes and Mary Turbeville, a legacy of 500*l.*; and then to invest 500*l.* and pay the interest and dividends thereof to Sarah Brett for her life, and after her death to pay and transfer the capital unto his godson Thomas Robins, son of John Robins. The will then proceeded and concluded as follows:—"And as to, for, and concerning all and singular my ready monies and securities for money to me belonging, and all other my personal estate and effects, whatsoever and wheresoever the same may be at the time of my decease, I give and bequeath the same unto my said godson, the said Thomas Robins, his executors, administrators, and assigns. I give and devise all estates vested in me on any trusts, or by way of mortgage in fee, and which I have power to dispose of by this my will, with the appurtenances, unto the said John Robins and Benjamin Robins, and to their heirs, executors, administrators, and assigns, according to the respective natures and legal qualities of the same estates respectively, upon trust to hold or dispose of the said trust estates in the manner in which they ought to be held and disposed of pursuant to the said trusts, and upon payment of the money secured on mortgage, to convey or assign the estates on mortgage to the person or persons entitled thereto for the time being; and it is my will, that the receipts in writing of the said trustees or trustee for the time being acting

(2) 3 Atk. 235.

under this my will shall be sufficient discharges to all persons and purchasers for his, her, or their purchase or other money or monies, or for so much thereof as in such receipts shall be expressed to be or to have been received, without such purchaser or purchasers or other person or persons being bound to see to the application, or answerable for the loss, misapplication, or non-application thereof, or any part thereof; and further, that it shall be lawful for the trustees or trustee for the time being acting under this my will, in the first place to deduct and retain to themselves, and to allow to each other, all loss, costs, charges, and expenses they or he shall bear or be put unto in the execution of this my will, or in relation thereto; and that they or either of them shall not be answerable for the other or others of them, or for the heirs, executors or administrators, or the acts, deeds, or defaults of the others or any other of them, but each for his own acts, deeds, and defaults only; and that neither of them shall be answerable for any banker, broker, or other person with whom or in whose hands any of the trust monies shall be deposited or placed; nor for any loss, damage, or misfortune which may arise or happen in the execution of this my will, or in relation thereto, except the same shall arise or happen by or in consequence of his or their own wilful default. And lastly, I hereby nominate and appoint the said John Robins and Benjamin Robins executors of this my will, hereby revoking all former wills."

The testator died in October 1845, leaving Mr. W. B. Collis, the plaintiff, his heir-at-law. One of the persons to whom a legacy of 500*l.* was given was a daughter of the plaintiff.

The bill was filed by Mr. W. B. Collis, against the trustees and executors and T. Robins. The questions in the suit were, first, whether the produce of the real estate, after payment of the sums properly charged on it, went to the heir-at-law, as being undisposed of under the will, or to T. Robins under the gift to him of the testator's personal estate; and secondly, whether the testator's debts were to be paid out of his real estate, in exoneration of his personal estate, or out of his personal estate.

Mr. Wigram and *Mr. Prior*, for the plaintiff.

Mr. Hodgson and *Mr. Follett*, for the defendant T. Robins.

Mr. Bacon and *Mr. Bentinck*, for the executors and trustees.

The cases cited on the question whether the debts were charged on the real estate in exoneration of the personal estate were,—

Brummel v. *Prothero*, 3 Ves. 111.
Aldridge v. *Lord Wallscourt*, 1 Ball & B. 312.
Greene v. *Greene*, 4 Madd. 148.
Michell v. *Michell*, 5 Madd. 69.
Driver v. *Ferrand*, 1 Russ. & Myl. 681.
Blount v. *Hipkins*, 7 Sim. 43; s. c. 4 Law J. Rep. (N.S.) Chanc. 13.

Knight Bruce, V.C.—Since the argument, I have read attentively the will in this case, upon which two questions only were raised. As to one of them, I think that the will does not give to T. Robins, and does not dispose of, the surplus of the beneficial interest in the produce of the testator's real estate, after paying the charges which ought to be considered as imposed upon it, according to the true construction of the instrument; and that this surplus therefore, if any, belongs to the plaintiff as the heir.

The other question, namely, whether the real estate or the personal estate is the fund first applicable to the payment of the testator's debts, (for it has not been argued that the personal estate is the first fund for paying the funeral expenses, and the expenses of proving the will in the Ecclesiastical Court,) has appeared to me one of more difficulty. Upon this it occurred to me to doubt whether the act 3 & 4 Will. 4. c. 104. ought not to have some influence, so as to render a decision since the act in favour of the personal, against the real estate, right, which before the act would have been erroneous. I cannot, however, venture to say that, in the present instance at least, I ought so to view it; though certainly where a testator dies solvent a charge of his debts on his real estate by his will is at present of little or no materiality, so far as his creditors are concerned, who need scarcely care whether the real assets are legal or equitable, if they are in either case sure of payment—a remark subject of course to these considerations, that the state of the property may be such as to render material the question

whether the real assets are equitable, and that a creditor may, after his debtor's death, be barred by delay as to any remedy against his personal estate without being so against his real estate in certain circumstances; and it is to be recollected that what is now true of the real estate of all deceased debtors was for more than five and twenty years before 1833, true of the freehold estate of debtors who were at their deaths in trade.

[His Honour then stated the effect of the earlier part of the will, and read that part of it which is set out at length in the statement of the case.]

It appears therefore that the devisees in trust are the executors; that nothing is given to the heir, but that 500*l.* is given to his daughter; that there is an intestacy as to a part of the produce of the real estate; that there is but one universal legatee of the personal estate; and that such legatee is neither trustee nor executor, but is one of the four persons taking a beneficial interest in such part of the produce of the real estate as is disposed of. It appears also that unless under the words "all costs, charges, and expenses attending the execution of the trusts hereby created or in relation thereto," or the words "costs, charges, and expenses they or he shall bear or be put unto in the execution of this my will, or in relation thereto," expressions in construing which attention ought to be given to the place in which they are found respectively, it is clear that the instrument does not in terms notice or expressly refer to any payment or deduction as to be made out of the personal estate. I suppose it is equally clear that the expenses of the funeral and the proving of the will in the Ecclesiastical Court are not charged on the real estate, or made payable out of its proceeds. Whether this last circumstance, and whether the fact, that this particular will does not in terms call the gift of the personal estate "residuary," or the gift of a residue, ought, upon the question of exoneration, to be deemed of weight on either side, may perhaps be questionable. It has, however, been judicially said that a testator's acquaintance with the law is to be presumed; and certainly it is very plain that, if he knew the law, he would have known that whatever may have been his right of arranging the order and mode in which the different portions of his property should, as between themselves, be applied, it was beyond his power to exempt his personal estate from liability to his creditors at least, or to prevent his executors from acquiring the property in it, or to enable T. Robins, without their assent or the assistance of a court of equity, to obtain any benefit from it. A testator also, knowing the law, would know the difference between legal and equitable assets. I need not say whether, independently of authority, I should have thought it right to treat the instrument before me as exhibiting an intention of excluding the personal estate from the debts; for the question of exoneration has arisen on so many wills, has presented itself in such a variety of forms and circumstances, and is so ancient and almost so familiar a grievance of the Court, that authority upon it is abundant. The accumulation, indeed, of cases with the different views taken by different Judges of the nature and effect of particular phrases or provisions, has tended, I suppose of necessity, to embarrass the question. On the whole, however, some principles of interpretation with reference to the point under consideration have been recognized and established; which, whenever the point arises, ought to be kept in view, and not be intentionally abandoned. Still with reference to the true construction and effect of such a will as this, the authorities cannot, I think, be represented as uniform or harmonious, and I have therefore to consider whether those against or those for the plaintiff, as the testator's heir, preponderate. The reported cases more or less directly in point, which have been decided within the last 150 years would, extracted from the many volumes containing them, and collected, form together, I do not say a great evil, but a great book.

It appeared to me that on this occasion I might content myself, in addition to *Bootle* v. *Blundell* (1) with consulting particularly *Lord Inchiquin* v. *French* (2), *Duke of Ancaster* v. *Mayer* (3), *Webb* v. *Jones* (4), *Burton* v. *Knowlton* (5), *Brummel* v. *Pro-*

(1) 1 Mer. 193.
(2) Ambl. 38.
(3) 1 Bro. C.C. 454.
(4) 2 Ibid. 60.
(5) 3 Ves. 107.

thero, *Brydges* v. *Phillips* (6), *M'Cleland* v. *Shaw* (7), *Watson* v. *Brickwood* (8), *Tower* v. *Lord Rous* (9), *Greene* v. *Greene*, *Michell* v. *Michell*, *Driver* v. *Ferrand*, *Blount* v. *Hipkins*, and *Lamphier* v. *Despard* (10). Having done this, and having done so with the conviction that I should be in error were I to depart from any principle or rule which, in the course of the judgment in *Bootle* v. *Blundell*, (a judgment containing various observations having, as I think, a particular bearing, as well as a bearing generally on the present case), Lord Eldon recognized or laid down, I have arrived at the conclusion, that preponderance of authority is in favour of the heir on the point of exoneration. Among the propositions which, in the case I have just mentioned, were stated by the great Judge who decided it, are these:—"I can find no rule deducible," says Lord Eldon, "from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that, since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication' to operate that exemption. Thus much can be collected from the cases; but when you proceed further, and inquire what it is that constitutes this evident demonstration, plain intention, or necessary implication, it does appear to me that Lord Alvanley is right when he says you are not to rest on conjecture, but the mind of the Judge must be convinced that he is deciding according to what the testator intended (11). The expression 'necessary implication' is frequently applied to cases between a devisee and heir-at-law, and yet there is hardly a case decided against an heir-at-law where the implication upon which it was so decided was of absolute necessity. It is but a loose way of defining this expression to say, that the intention must be so probable that the Judge cannot suppose the contrary; and it seems strange to lay down as a rule, that express words shall not be required, but yet that there must be expressions tantamount to express words. I take it, that this is what will be found to be the result of all the cases: that the Judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt his personal estate. Many rules are clear and positive. First, it is certain that in equity, as well as at law, the personal estate is first liable, and that the amount of the personal estate, whatever it may be, makes no difference in the case. That was not so, however, according to the old decisions, as I shall have occasion to point out to you presently. I take it to be certain, also, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. Then, on the question whether the personal estate is discharged or not, I apprehend it will be found that the very same circumstances have, in the minds of different Judges led to different conclusions; and this is the result to be drawn from the most diligent comparison of all the cases" (12). And he afterwards says, "It is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided" (13). Applying this test, or these tests, to the present will, and recollecting what has been determined in the cases of which the authority is questioned, I am unable to say that this testator's personal estate is not to be subjected to his debts in its ordinary course and common order; and here I may observe that the present Lord Chancellor in a case before him in 1838, thus expresses himself: "We must presume that the testator was cognizant of the rule of law, and if he knew the law at all, he must have known that he could not exonerate the personal estate from the burthen of his debts, unless he so expressed himself as to lead the Court to the fair conclusion, from the language which he used, that such was the intention which he meant to express (14)."

(6) 6 Ves. 567.
(7) 2 Sch. & Lef. 538.
(8) 9 Ves. 447.
(9) 18 Ibid. 132.
(10) 2 Dru. & War. 59.
(11) *Vide* Brummel v. Prothero, 3 Ves. 113.

(12) 1 Mer. 219.
(13) Ibid. 230.
(14) Bickham v. Cruttwell, 3 Myl. & Cr. 763, see p. 772; s. c. 7 Law J. Rep. (N.S.) Chanc. 196.

; being clear that upon those who allege a testator's personal estate not to be the first fund for paying his debts, lies the burden of showing that, in so many words or by expressions tantamount, he has directed his personal estate not to be so; and that they must do more than bring his meaning into doubt, I find it impossible, considering the state of the authorities, to declare that the legatee of the personalty has in the present instance done this. I must therefore decide in the heir's favour both the points which have been argued, though my decision would, I very much suspect, be altogether reversed by the testator, if he could sit in judgment on his will. But as Lord Eldon, in a case that I have several times mentioned, said, "after all, the question is, not what the testator really meant, which can never be ascertained, but what he has authorized the Court to say it is possible was his meaning."

K. Bruce, V.C.
1846.
Nov. 7.
L.C.
1847.
Feb. 13.

BRIGHTON *v.* NORTH.

Company—Ouze Banks Commissioners, Powers of—Trust.

A company had been projected and were applying to parliament for powers to reclaim certain lands from the sea, and to divert the water into the Ouze, and the commissioners for maintaining the banks of that river were applying part of their funds in opposing that bill in parliament, on the ground that the scheme would be injurious to the banks of the river. A bill was filed by certain landowners liable to contribute to the funds of the commissioners, to restrain them from making such an application of their funds. A demurrer for want of equity was allowed, it being held that such an application was incident to the trust.

This bill was filed by four plaintiffs, on behalf of themselves and all other the owners of lands and grounds situate within the district in the act of parliament thereinafter mentioned, called the Second District, and of all other persons subject to be taxed, rated, assessed, and charged under and entitled to the benefit of the said act of parliament, in respect of lands or grounds in the said second district, except the defendants thereto, against six defendants who were commissioners of the above-mentioned district, and their treasurer. The bill stated several provisions in an act of parliament, 1 Vict. c. lxxxi. intituled, "An act to raise and apply funds for the future maintenance and repair of the banks of the River Ouze, between Denver Sluice and the Eau Brink Cut, in the county of Norfolk." By that act certain lands which were near the Ouze, and which would be subject to inundation if the banks of the river were not maintained, were divided into districts, and commissioners of the different districts were appointed; three commissioners were to constitute a quorum: both the general and the district commissioners were authorized to appoint a clerk, treasurer, and other officers, and might sue and be sued in the treasurer's name. The commissioners of the second district were to keep part of the west bank of the river in repair: the commissioners were to apply the taxes, rates, and other monies, which were to be raised under the act, in making, doing, constructing, and executing all such works and matters and things as they should think proper for putting their respective parts of the bank in a permanent state of stability, and for securing and preserving the foreland and slopes of the bank: and the district commissioners were empowered to assess their respective districts: and the general commissioners had a controuling power over all the district commissioners. The plaintiffs were owners of lands in the second district, but were not commissioners or deputy commissioners. The Ouze is a tidal river.

The bill stated that shortly before the session of 1846, divers persons formed themselves into a joint-stock company, called "The Norfolk Estuary Company," for the purpose of reclaiming from the sea a large tract of land in the county of Norfolk, below Lynn Regis, over which the waters had hitherto rolled at every tide, by diverting such water into narrow channels, and thence into the river Ouze; that in the early part of that session the said company brought a bill into the House of Commons, to enable them to carry their scheme into

effect, which bill was still pending; that shortly afterwards, and on the 9th of March 1846, a special general meeting of the commissioners and deputy commissioners, acting under the above-mentioned act of parliament for the second district, was duly held, at which a resolution was passed, that proceedings should be taken on behalf of the said last-mentioned commissioners, for watching, and if and so far as might be necessary, opposing the said bill in parliament, and for causing such provisions to be inserted therein as might be requisite for indemnifying the landowners in the said second district, from any greater charge in respect of the banks of the said river Ouze, consequent on the works contemplated by the said bill, than had been incurred by them on the average of the last eight years, and that a rate of 6*d.* an acre on the lands within the said second district should be raised under the provisions of the aforesaid act of parliament for defraying the expenses of and incident to the proceedings on behalf of the said commissioners, and that such expenses should in the mean time be paid out of the said funds then in hand, which had arisen under the provisions of the said act of parliament, in respect of the said second district; that the six first-named defendants were present, and acted as such commissioners at the aforesaid meeting, and thereby constituted the majority in number and value of the commissioners then and there present, by whose votes the aforesaid resolutions were passed; and that in pursuance of a resolution of another meeting, at which three of the defendants were present, a sum of 105*l.* was paid over by the treasurer out of the funds in his hands as treasurer of the commissioners, to one of those three commissioners, for the purpose of being applied for the objects aforesaid. The bill charged that whether the projected scheme was likely to be injurious to the banks or not, the funds received or receivable under the act of parliament or any part of such funds, ought not to be, and could not be legally applied for the purposes contemplated by the last-mentioned resolutions.

The bill prayed a declaration that the commissioners were not authorized under the act of parliament, or otherwise, in applying or expending any sum of money whatsoever, which, in pursuance of the same act, had been received by them in re the rates or the hauling fund, in d the expenses of any proceedings in watching or opposing or otherwise tion to the bill in parliament, or other purposes contemplated by the tions passed at the meeting held on of March 1846, and that the first fendants might be decreed to refu replace the sum of 105*l.* already ap such purpose, and that the defenda the commissioners and deputy com ers of the district might be restra injunction from applying any furth in watching or opposing the bill liament.

To this bill the defendants put murrer for want of equity, and want of parties, on the ground the commissioners and deputy sioners for the second district, and general commissioners and the A General ought to have been parties.

Mr. Rolt and *Mr. Bunny* app support of the demurrer; and

Mr. J. Russell and *Mr. Toller* plaintiffs.

The question discussed between ties was whether, assuming the w the projected company would be i to the banks of the Ouze, the com ers had any power under their act their funds in opposing the bill liament. On this point the followi were cited:—

The King v. *the Commissioners o for the Tower Hamlets*, 1 B 232; s. c. 9 Law J. Rep. M.

The Attorney General v. *Pea* Coll. 581.

The Attorney General v. *Con* You. & Coll. C.C. 417.

Upon the question of parties, a ticularly as to the Attorney Gener a necessary party, the following cas cited:—

Milligan v. *Mitchell*, 3 Myl. & s. c. 7 Law J. Rep. (N.S.) Ch

Davis v. *Jenkins*, 3 Ves. & B.

Frewin v. *Lewis*, 4 Myl. & Cr.

The Attorney General v. *Ne* 14 Ves. 1.

The Attorney General v. *Fou* Ves. 85.

Nov. 7, 1846.—Knight Bruce, V.C.—Application is made for an act of parliament to drain or inclose, or drain *and* inclose that is called the Wash. The mouth of the river Ouze is in the Wash. The commissioners of this district considered that if that bill in parliament were to pass, it would be prejudicial to the district in respect of which they were commissioners, and they therefore come forward as petitioners against the proposed act of parliament for the purpose of opposing it; it not being alleged that they were served with any proceeding of any description or with any notice of any description; it not being alleged that they had any notice beyond that notice which the public at large had in the shape of advertisements, which are required to be published of the intention to apply for such an act of parliament. Now, however good their intention may have been—and I have no doubt their intention was good—however reasonable it might have been for the landowners to subscribe among themselves for such an object, I have been unable hitherto to discover in this act of parliament any thing which would warrant the commissioners, so far as the act goes, in applying the produce of the rates, for the purpose of defraying any expense incurred or to be incurred in opposing such a bill in parliament. Unless, upon further consideration of the act, I should form a different opinion, I must hold that it was *ultra vires*, and therefore (subject to the objection for want of parties, if there be any) that the plaintiffs have an equity which, if the suit is rightly constituted in point of parties, would dispose of the demurrer, and if the suit is not rightly constituted in point of parties, would give a right to amend in order to cure the defect, if any. Therefore, as at present advised, I only wish to hear the case upon the objection for want of parties. If it is considered material to enter into that objection, considering what the probable result as to costs would be, on a question and in a suit of this nature, let the parties do as they like.

The question as to parties having been argued—

His Honour said—My present impression is, that this bill must be answered in its present shape. Therefore, unless I mention the matter again on Tuesday morning, let the demurrer be overruled, reserving the costs until the hearing of the cause or further order.

The defendants appealed from this decision, and the case was re-argued before the Lord Chancellor by the same counsel who appeared in the Court below.

Feb. 13, 1847.—The Lord Chancellor.—I have read through the Vice Chancellor's judgment: what he says is, that he does not find in the act of parliament any distinct authority to the trustees to apply the fund for the purposes stated in the bill. That may be very true, but the real question is, whether it is not incident to the duties they have to perform. Being upon a demurrer, I can only deal with the case as I find it on the pleadings; and the bill is filed by some individuals on behalf of themselves and others, described as owners of land and therefore liable to rates within this second district, and they apply for the protection of the Court against what they conceive to be something which is injurious to their interest. Now, these defendants, being commissioners of a certain district of the Ouze, and bound by the act of parliament to do what is necessary to keep the river within its limits, and to protect the lands adjoining from inundation, and authorized by the act of parliament to levy a rate upon the proprietors of land within that neighbourhood for the purpose of defraying those expenses, another project being on foot affecting the river lower down, they call a meeting, as alleged upon the bill, at which they come to this resolution, that proceedings should be taken on behalf of the commissioners for watching, and so far as might be necessary opposing, the said bill in parliament, and for causing such provisions to be inserted therein as might be requisite for indemnifying the landowners in the second district from any greater charge in respect of the banks of the said river Ouze, consequent on the works contemplated by the said bill, than had been incurred by them on the average of the last eight years, and that a rate of 6*d*. per acre should be levied to meet that expense. One would think that was a very wise provision on behalf of all those who are interested in the lands in

that district. It might or might not be well founded in point of fact, but there being works contemplated lower down the river which might affect the embankments of which the defendants are trustees and conservators, they pass a resolution for watching, and if necessary opposing, a bill then in parliament authorizing the works so contemplated lower down the river, so as to take care that the landowners in that district were not exposed to a greater rate in respect of the works so in contemplation. Well, the bill does not state that the works so contemplated would not be injurious to the lands within that second district, but, on the contrary, they raise this proposition: they say that the commissioners allege that the scheme of the Norfolk Estuary Company, proposed to be effected under the provisions of the bill, is likely to be injurious to the banks of the river Ouze, and that they support their resolution or pretend to do so upon that ground. It is not alleged whether it be well founded or not, but then they charge that whether the scheme is likely to be injurious to the banks or not, the funds received or receivable under the said act cannot be applied in the manner proposed by the resolution. There is a proposition raised, therefore, upon the construction of the act of parliament, that, however injurious these projected works may be, if they are highly injurious, amounting to an actual destruction of these works, still the trustees of the second district are not authorized to expend one single farthing of the money intrusted to their care in protecting the works of which they are themselves the trustees and conservators. Now, that being the proposition, and that being all that the plaintiffs allege in the pleadings, and as the rule is to take the case as strongly against the pleader as the allegations in the pleadings will justify, I must assume, for the present purpose, that these works are likely to be injurious to the works of which the defendants are trustees; and the proposition is, that however injurious and destructive they may be, the defendants are not to be at liberty to employ any part of the money in protecting the works. Then, I put the case of actual injury to the works and legal expenses necessarily incurred in protecting them; the proposition must be, you may tax the neighbourhood to make them and to n them, but if anybody afterwards ch come and destroy them, your hands a because if you can protect them immediate and direct injury, surely not be said that you cannot prote against not so direct but still an in danger—that is, to prevent the parlia powers being given to another co You do not find on the face of th parliament an authority to apply fi that purpose, because it is incident t trust. Every trustee would be allo proper expenses incurred in defen property intrusted to his care. I that proposition is not intended to troverted; and if it cannot be cont as a general proposition, so it ca questioned in the particular case. now upon the pleadings, and I wish understood that I proceed on the that the bill presents a case on v must be assumed that the works w or might very likely be injurious works of the defendants; and und circumstances, although there is n authority in the act of parliament, it is incident to the nature of the tru they have to perform that they sh allowed to apply the funds in that

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V.C. Jan. 19. } LORD CHESTERFIELD v.

Injunction to stay Trial.

A special injunction to stay a tria will not be granted until the common tion has been obtained upon default.

A motion was made on behalf of th tiff for a special injunction to stay p ings at law, commenced by the def to recover against the plaintiff the 200*l.* upon a cheque alleged to ha given in the year 1841, to one of fendants, who was a waiter at Cro Club-house. The action was com on the 23rd of December 1846.

Mr. Bethell and *Mr. Wright* app support of the motion.

Mr. Stuart and *Mr. Beavan*, for fendants, raised an objection that not competent for the plaintiff to special injunction until the common

tion had first been obtained upon the default of the defendant.

For the plaintiff, it was alleged that the proceedings at law had been carried on with such haste that the time had not yet expired after which the plaintiff, in the ordinary practice of the Court, would be entitled to the common injunction, and the action was actually set down to be heard on the following day.

The Vice Chancellor said it had often appeared to him desirable that some order should be made which would enable the courts of equity to keep pace with the proceedings at law; but as the practice at present stood, the plaintiff could not have the injunction asked for.

Wigram, V.C. March 24, 25, 30. } Costobadie v. Costobadie.

Will—Trust—Discretion.

The testator, by his will, directed that his wife should receive all the rents and profits of his real and personal estate, and pay and apply the same to and for the use of his said wife and the children of their marriage, agreeable and according to her own discretion during her life. On bill by one of the children against the widow, praying that a proper proportion of the income might be secured for the plaintiff's benefit,—Held, that the plaintiff had an interest, but that she was only entitled at the hearing to an account of the income of the testator's estate and of the application of such income, in order to enable the Court to judge whether the discretion had been fairly exercised.

Where an interest in income is given to a person subject to the discretion of another, the Court will not deprive the trustee of the exercise of that discretion so long as it is fairly exercised.

Jacob Costobadie, the testator in the cause, by his will devised and bequeathed his real and personal estate to trustees upon trust out of the income thereof, to pay the legacies and annuities therein mentioned, "and subject as aforesaid, upon further trust that my said dear wife shall receive all the rent, dividends, interest, and profits of all and singular my real and personal estates, and pay and apply the same to and for the use of her my said wife and the children of our marriage, agreeable and according to her own discretion, during her said life;" and after the death of the widow the testator directed that the property should go upon the trusts thereof declared in his will. The testator died in 1828, leaving his widow and several children (of whom the plaintiff was one) him surviving. The plaintiff, who had attained the age of twenty-one in the lifetime of the testator, continued to reside with the widow till 1833, and from that year to the filing of the bill had resided apart from her mother. In 1844 the plaintiff instituted the present suit against her mother and the other parties interested under the testator's will; and the bill stated a special case against the mother of having, by her conduct, compelled the plaintiff to seek a separate residence, and charged that, under the circumstances, the mother, in the exercise of the discretion given to her by the will, had not allowed the plaintiff such a portion of the income as under the trusts of the will, and the amount of the property, she was entitled to. The bill prayed an account of the income of the testator's estate, and that a proper proportion of such income might be secured for the plaintiff's benefit. The case made by the bill, as to the conduct of the mother, was altogether unsupported by the evidence; and it was proved that from 1833 the plaintiff had from time to time received from her mother various sums of money and other benefits. At the hearing the questions argued were, first, whether the words of the gift to the widow created a trust for the testator's children; secondly, whether a child who was living apart from the mother was entitled to participate in the income; and, thirdly, whether the Court would interfere with the widow's discretion in the application of the income.

Mr. Romilly and *Mr. Sidney Bell*, for the plaintiff, contended that the words of the gift created a trust for the children, notwithstanding they might be living apart

from the mother, and that the Court would inquire whether the discretion had been fairly exercised, and would direct an account to be taken of the rents and profits of the testator's estate; and they cited the following cases:—

Brown v. *Higgs*, 4 Ves. 708, 8 Ves. 561.
Burrough v. *Philcox*, 5 Myl. & Cr. 73.
Bateman v. *Foster*, 1 Coll. 118.
Knight v. *Knight*, 3 Bea. 148; s. c. 9 Law J. Rep. (N.S.) Chanc. 354.
Knight v. *Boughton*, 11 Cl. & Fin. 513.
Longmore v. *Elcum*, 2 You. & Coll. C.C. 370; s. c. 12 Law J. Rep. (N.S.) Chanc. 469.
Harding v. *Glyn*, 1 Atk. 469.
Hamley v. *Gilbert*, Jac. 354.
Liley v. *Hey*, 1 Hare, 580; s. c. 11 Law J. Rep. (N.S.) Chanc. 415.
Raikes v. *Ward*, 1 Hare, 445; s. c. 11 Law J. Rep. (N.S.) Chanc. 276.
Crockett v. *Crockett*, 1 Hare, 451; s. c. 11 Law J. Rep. (N.S.) Chanc. 279.
Thorpe v. *Owen*, 2 Hare, 607; s. c. 12 Law J. Rep. (N.S.) Chanc. 417.
Chambers v. *Atkins*, 1 Sim. & Stu. 382; s. c. 1 Law J. Rep. Chanc. 208.
Wetherell v. *Wilson*, 1 Keen, 80; s. c. 5 Law J. Rep. (N.S.) Chanc. 235.
Woods v. *Woods*, 1 Myl. & Cr. 401.
Page v. *Way*, 3 Beav. 20.
Leach v. *Leach*, 13 Sim. 304.

Mr. Rolt and *Mr. Glasse*, for the widow, contended, that the discretion was given to the mother in such terms that the Court could not interfere with it, except a case of fraud or dishonesty were made out; that was altogether rebutted by the evidence of the defendant; and they cited *Bowden* v. *Laing* (1).

At the conclusion of the argument, his Honour expressed his opinion that at least the plaintiff would be entitled to a decree for an account; but he reserved his judgment until he should have looked through the pleadings.

March 30.—WIGRAM, V.C.—In the course of the argument I stated that there must, in this case, be preliminary inquiries as to the children of the testator, and that the plaintiff was at least entitled to an ac the residuary estate of the testator refuse such an account simpliciter w in effect to make the widow absolut of the property; whereas it is not that the plaintiff has some equitable in the residue, though subject to a tion in her mother. I think the is entitled to an account, but at pre nothing more. As to the discre power given to the mother, I had in the case of *Cafe* v. *Bent* (2) to to what extent the Court would i with the discretion a testator ma proper to give to a trustee for other testator has a right to give his pro he pleases; and as he may give an interest to his children, so he may circumscribe it in any way he thinks He may give it, if he pleases, sul the discretion of another person; long as that person exercises a so honest discretion, I am not aware authority which says, or of any p upon which the Court would say, i alter the nature of the testator's deprive the party of the discretion w testator has given him. Where a and honest discretion has been ex the legatee gets all the testator gav tended to give, namely, so much a exercise of a sound and honest di by another party he will be found to. But, consistently with the having an interest, subject to the discretion, she has a right to a di of the property in respect of which terest exists, and also a right to a di of all the acts which have been do the reasons for doing them, which fendant may be able to give. She right in order that the Court may to see whether the discretion wh been exercised is within the limi sound and honest discretion; but that I am not aware that because who takes an interest in property, to the discretion of another, is dis with the exercise of that discreti therefore the Court will take aw discretion from that other person, a cise it itself. If a bill is filed, th

(1) 14 Sim. 113.

(2) 3 Hare, 245; s. c. 13 Law J. R Chanc. 169.

will, of course, inquire into the acts which have been done, and may possibly (as has been done in many cases) require the trustees to exercise the discretion under the view of the Court. If that were not done, there might at each moment be a new case arising; but I am not aware that the Court has ever denied the right of a testator to impose a discretion, or said that it would take it away, as a mere matter of course. And if that view of the case had been taken by the plaintiff's advisers, the case might probably have been disposed of almost as a matter of course. In that case, however, the bill should have been otherwise framed, and should have simply stated the will, the present position of the family, and have prayed the judgment of the Court upon the construction and effect of the will and of the act done. That view, however, did not, unfortunately, satisfy the plaintiff, who, instead of stating the simple case I have mentioned, has made a special case against her mother the defendant. The statement is this—[His Honour then stated the case made by the bill against the widow]; and after observing that the evidence entirely failed to make out that case, said that he had, therefore, no materials for doing more than he should have done upon a simple bill asking for an account, and to have the judgment of the Court upon the question whether Mrs. Costobadie had committed a breach of trust or not by the manner in which she had exercised her discretion. The decree directed an inquiry as to the children of the testator then living, and whether such children were all parties to the cause; and if they were, the Master was then to proceed to take an account of the rents and profits of the testator's estate come to the hands of the defendant, the widow, or to the hands of any other person or persons by her order or for her use; and to inquire and state to the Court what part of such income had been paid to the plaintiff since the death of the testator, and under what circumstances; and that the defendant, the widow, should be at liberty to carry in any proposal before the Master for the application of the whole or any part of the future income of the testator's real and personal estate for the benefit of herself and children, with liberty to state special circumstances.

L.C.
March 20, 26; April 1. } CHAPPELL *v.* PURDAY.

Copyright — Costs — Appeal for Costs only.

The costs of a suit to protect a copyright will follow the result of an action at law, to try the validity of the copyright, although the mode of defence in the action directed at law may have been improper.

Upon a bill filed to restrain the alleged infringement of a copyright, the bill was retained, with liberty for the plaintiff to try the title by an action at law. The plaintiff having brought his action and failed, the Vice Chancellor dismissed the bill without *costs; but, upon appeal, the Lord Chancellor varied the decree by directing the bill to be dismissed* with *costs.*

The plaintiff, claiming to be entitled to the copyright of a work comprising the music of the opera "L'Hotellerie de Terracine," or "Fra Diavolo," on the 9th of January 1841, filed a bill against the defendant, charging him with pirating the overture of that opera; which overture was also published and sold by the plaintiff. The bill prayed the usual account, and also an injunction to restrain the defendant from printing, publishing, selling, and disposing of the overture, or any part of the airs, music, or melody thereof, arranged or adapted for or to the pianoforte, flute, violin, or violoncello, so published and sold by the plaintiff. The plaintiff obtained an injunction *ex parte*, which was subsequently, on the 24th of May 1841, dissolved, with liberty to the plaintiff to bring an action. The plaintiff did not at once proceed with his action, but filed a long amended bill, and proceeded with his evidence, the defendant, for his own protection, joining in the commission. At the hearing of the cause on the 8th of July 1843, the Vice Chancellor of England made an order that the plaintiff's bill should be retained for twelve months, with liberty for the plaintiff to bring such action as he should be advised and proceed to trial therein, the defendant undertaking at the same time to keep an account of the number of copies sold by

him of the overture, and of the sums for which the same should be sold, and in case the plaintiff should not bring such action and proceed to trial therein within the time aforesaid, that the plaintiff's bill should be dismissed with costs to be taxed, but in case the plaintiff should bring such action and proceed to trial within the time aforesaid, the Court reserved the consideration of the costs of the suit and all further directions until after such trial; the plaintiff, therefore, brought an action against the defendant, and the result of the trial at law was, that ultimately a verdict was entered for the defendant (1). On the 19th of July 1845, the cause came on again before the Vice Chancellor on further directions, when his Honour dismissed the plaintiff's bill *without* costs.

The Vice Chancellor, in delivering judgment, stated the *primâ facie* rule was, that if a plaintiff's bill was dismissed, it should be so with costs; but there were many cases in which Lord Eldon and other Judges had departed from that rule under particular circumstances; and in the present case, although the point of law was in favour of the defendant, yet that by the course which the defendant had pursued in setting up various questions of fact, in all of which he had virtually failed, the plaintiff had been led into unnecessary expense; and that, under these circumstances, it was right that the bill should be dismissed *without* costs.

The defendant appealed from this decision.

Mr. Anderdon and *Mr. J. W. Smith*, for the appellant.—This is an exception to the rule that an appeal will not lie for costs only. The sole foundation of the title in equity is the alleged legal right. There is no equitable ingredient if this fails. The maxim *accessorium sequitur suum principale* applies. The costs in equity must follow the result at law. Is it reasonable that a party who brings his action and fails should be in a better position than if he did not bring his action? There are no facts to be gone into. Here the simple point is, title or no title. The plaintiff took exceptions for scandal and impertinence, which were overruled, and the costs ordered to l in the cause.

Mr. Rolt and *Mr. Chandless*, co There is no inflexible rule that the equity follow the result at law. Su party files a bill for discovery in ai action at law: the costs of the di are not dependent on the result. Tl of appeal cannot go into the facts— refer to the pleadings or look at t dence used at law. It is confined petition of appeal. How can the review the discretion exercised as t without full knowledge of all the The Court may grant an injuncti yet make the plaintiff pay the costs shews the adjudication as to costs is discretionary.

[The Lord Chancellor.—That tion only applies where the plaintiff s in establishing his title.]

There is no general rule that i case where the plaintiff fails he pay *Angell* v. *Davis* (2) mentions onl exceptions to the rule against appea costs.

[The Lord Chancellor.—If apparent on the face of the pleading it is the subject of appeal.]

Why should the hands of the C tied in the case of a legal right, and the case of an equitable right? T fendant may conduct his defence sively and vexatiously. Why are tl reserved by the original decree if th tiff brings an action? Can it be saic the Court reserves the costs, it has cretion as to those costs?

The following cases were cited course of the argument:—

Peachy v. *Somerset*, 1 Stra. 447
Owen v. *Griffith*, 1 Ves. sen. 250 520.
Turner v. *Turner*, 2 P. Wms. 2
Cowper v. *Scott*, 1 Bro. C.C. 1
Meyrick v. *Whishaw*, 4 Madd.
Baily v. *Taylor*, 1 Russ. & M s. c. 8 Law J. Rep. Chanc. 4
Burkett v. *Spray*, 1 Russ. & M

(1) See report of trial, 14 Mee. & Wels. 303; s. c. 14 Law J. Rep. (N.S.) Exch. 258.

(2) 4 Myl. & Cr. 360; s. c. 9 Law J. R Chanc. 3.

Millington v. *Fox*, 3 Myl. & Cr. 338.
Taylor v. *Southgate*, 4 Ibid. 203; s. c. 8 Law J. Rep. (N.S.) Chanc. 137.
Bacon v. *Spottiswoode*, 1 Beav. 382.
Tod v. *Tod*, 1 Bligh, N.S. 639.
Maguire v. *Maddin*, 2 Bro. P.C. 393.
The Marquis of Waterford v. *Knight*, 3 Cl. & Fin. 270; s. c. 11 Ibid. 653.
Sheehy v. *Lord Muskerry*, 7 Ibid. 1.
Calcraft v. *West*, 2 Jones & Lat. 123.

The Lord Chancellor. — The decree appealed from on the further directions, and the original decree on which it was founded shew the situation of the cause so far as is necessary for enabling me to come to a conclusion in this case. The decree on further directions is, that upon hearing the order of the 8th of July 1843, and the order of the Court of Exchequer of Pleas of the 12th of June 1845, by which it was ordered that the verdict found for the plaintiff on the trial of the action, should be entered for the defendant, the Court orders the plaintiff's bill to stand dismissed. This order shews what was the result of the proceeding at law, and that it was not a verdict obtained under circumstances which might not try the right, but that the court of law set aside the verdict found for the plaintiff, and ordered it to be entered for the defendant, shewing, therefore, an adjudication, and that the plaintiff had failed in establishing his legal right. The original decree shews also how this arose, and what was the object of the suit. An account was directed to be kept of what was received by the defendant from the copyright. The injunction was granted, and the Court took the usual course of retaining the bill, giving the plaintiff permission to try the right by an action at law, but directing that if the plaintiff did not in due time bring his action, then the bill was to be dismissed *with costs*, but if he brought an action, the costs were reserved. This was obviously necessary, because the object being to try a legal right, if the proceedings at law had not so tried the right as to satisfy the Court in which of the parties the right was, the Court would not have been in a situation to dispose finally of the costs. The Court, however, adjudicated to this extent, that if the plaintiff did not try the right, his bill was to be dismissed with costs, thus only putting on the decree what is according to the universal practice of the Court, that if a party comes here for relief, founded on a legal right, the plaintiff must fail in his proceedings in equity, if the legal right is not established. It is then a point adjudicated, that if he does not establish his right, he is to pay the costs. It therefore follows that if he takes the course directed, for trying his legal right and fails, the same result must ensue. It becomes a matter of course to dismiss the bill with costs. These two orders cannot stand together. The Court could not mean to say to the plaintiff "if you do abandon your right, the bill shall be dismissed with costs; but if you try and fail, the bill shall be dismissed without costs." In both cases the party would be in the same situation, except that in the latter additional costs would have been incurred. Looking only then at what the Court has done by its decree, and not at any of the circumstances of the case, I consider that the original decree laid down a rule which should have been followed upon that ground alone. I should have thought it the duty of this Court, for the purpose of amending that defect, to vary the decree made on further directions. The first decree is consistent with the forms and practice of the Court, and the second is not. If the second decree was made on grounds arising from the conduct of the defendant in the cause, the case was as much before the Court at the original decree as on the further directions. It might have been adjudicated on the original hearing. The record was then complete. The suit has been since asleep. The Court only retained the matter to see the result of the proceedings at law; it only retained the bill in order to try the question at law. Then, therefore, was the time at which the plaintiff should have made any case which he had against the defendant. Whether he did so or not, or whether in doing so he failed, I have no means of knowing. If any unnecessary expense was created by the defendant's course of conducting the trial, the practice of the court of law supplies a remedy; the court of law was quite competent to set this right. Any impertinence or impropriety would be visited on the defendant by the court of law.

But this would not affect the costs of the suit, the only question in the suit being the right of the plaintiff to call in question the right claimed by the defendant.

Besides, however, the question in this case, it is of importance that it should be generally understood what is the right course of dealing with the question of costs on appeal. There are many cases in which it has been discussed. When it is a matter of pure discretion, arising out of the circumstances of the case, one branch of this court cannot review the discretion exercised by another branch without knowing all which may have been known to that other branch of the court before which the case was originally heard. There the rule must be maintained that there is no appeal for costs. But where the question involves a principle, or a rule of practice is to be laid down, then an exception is to be made. So in particular cases where it would be very hard to refuse to consider the question of costs. And where the matter has not been one of pure discretion, the Court will entertain an appeal for costs; as, for example, where costs are ordered out of a particular fund or estate, and the question is only what fund is to be charged, the Court will hear an appeal, though only for costs. There is another exception, where, on the face of the proceedings, the decision as to costs is inconsistent with the general practice of the Court, as if the Court should refuse to give the costs of a bill of discovery. The defendant may indeed have misconducted himself, yet the Court says the plaintiff has brought him here, and the rule as to costs is clear. So in other cases where there is a general and settled practice, there may be an appeal for costs. This was carried to a great extent in *Owen* v. *Griffith*. That was a strong instance. There the decree was against a mortgagee in possession. It appeared he had been overpaid. The decree ordered possession to be delivered to the plaintiff, and directed the defendant to pay costs. The mortgagee there had failed, but by the general practice it is of course for him to have his costs. He appealed, and though it was a pure question of costs, yet the appeal was allowed, and Lord Hardwicke gave the defendant his costs. The practice of the Court gave a mortgagee his costs, and there was thus a departure fr established practice. This course w followed by Lord Northington in *Co Scott*. There were also two cases bef In *Taylor* v. *Southgate* there was a bil sought to charge executors personal default. The charge was unsuppo evidence, and at last it came to be a an account only. Before the hearin ever, a decree was made in another *Taylor* v. *Scrivens*, which had bee tuted for the general administratio testator's estate, directing the usual a and inquiries. The charges of mis having failed, it remained an ordin against an executor for an accou decree was made, dismissing the b directing the payment of the plaintif up to the time of the decree in the a tration suit, out of the funds in court suit. There was an appeal from t of the decree, and I held the Court h carried, and accordingly altered the by ordering that so much of the sought to charge the defendants per should be dismissed with costs, to be the plaintiff. This was a question c and therefore it was contended, tha an appeal for costs only, it ought to missed. I considered, however, tha a case involving so much of princip make it an exception to the ordina Another case, of *Angell* v. *Davis*, nized the same principle; and referred to several cases to shew ceptions to the rule.

Where, therefore, the Court has b the means of judging of the propriet decision as to costs, without going i facts, the reason for the rule fails, an Court can decide without going into facts, the rule does not apply, and jus tween suitors requires the matter sh dealt with. I am of opinion, therefo the decree on further directions in the case is a miscarriage, the plaintiff failed at law in making out the ri which his title to come here depende dismissal of the bill must therefore *costs* instead of *without costs*.

Bill dismissed accordi

L.C.
. 11. } LEWIS v. COOPER.

Bill, Dismissal of — Demurrer overruled.

Where a demurrer has been overruled with costs, and the defendant has appealed, the plaintiff is not entitled to the common order of course to dismiss his bill, upon payment of costs.

A demurrer had been put in to the bill, which was overruled in November 1846, with costs: and in December, the plaintiff obtained the common order at the Rolls, to dismiss the bill with costs. The defendant had appealed from the decision. Shortly afterwards, the defendant obtained an order from the Master of the Rolls, discharging the order of course, on the ground that, in the petition for it, no mention was made of the demurrer having been overruled, and that it was, consequently, irregular. The plaintiff now moved, before the Lord Chancellor, to discharge the last-mentioned order of the Master of the Rolls.

Mr. J. Parker, in support of the motion, contended, that a plaintiff had absolute controul over a suit until it was heard; and that, in this case, the plaintiff was entitled to the common order to dismiss the bill at any time, and that the proceedings respecting the demurrer did not affect this right in any manner.

Curtis v. *Lloyd*, 4 Myl. & Cr. 194; s. c. 8 Law J. Rep. (N.S.) Chanc. 85.

Mr. Rolt and *Mr. Terrell*, contrà, insisted, that after such a proceeding in the cause as a decision upon a demurrer, and an appeal from that decision, the controul of a plaintiff over his suit was diminished. The plaintiff could no longer obtain a common order to dismiss the bill; but that, at all events, he was bound to state all the special circumstances in the petition which he presented to obtain the order, and that the order to dismiss in this case ought to be discharged upon that ground alone—*Cartwright* v. *Smith* (1).

Mr. Parker replied.

The LORD CHANCELLOR.—These orders, which are obtained of course, and chiefly at the Rolls, are very necessary in the prosecution of suits; and it is clear that, without proper regulations, the granting of these orders may be productive of great injustice. I understand that, where any proceedings of this kind have taken place in the progress of a suit, the officer, when informed of those facts, does not give these orders of course. It is contrary to the practice to issue the order without reference to the facts. Though the form of the order follows the usual course, any particular circumstance ought to be stated in the application for the order.

The order in question was not obtained according to the practice of the Court. That is the ground on which the Master of the Rolls disposed of the case. I am very strongly impressed with the notion that such an order as this was never made before. The order of course to dismiss, is given on the supposition that such an order gives the defendant as much as the Court would give him; and therefore the plaintiff is entitled to such an order. But the position of the parties is changed where there has been any proceeding which gives one party a right against the other, as a demurrer, and the party is liable to pay the costs of the demurrer. The demurrer is decided upon by the Court, and the defendant has the adjudication of the Court on the merits of the plaintiff's case as stated in his bill. But it is very important to consider what he may lose if the plaintiff may deprive him of this benefit, without any notice, and without the Court being able to intervene. If the plaintiff is at liberty so to do, he may do so to-day, the moment after judgment is heard. If you consider to what extent that may be carried, it is very difficult to say the Court will admit a practice which will allow the plaintiff so to deal with his adversary. This is not a case in which the party would be entitled to dismiss the bill in the ordinary mode upon paying costs, which may be a very small portion of the costs due to the defendant.

What is sufficient for my purpose is, that this is not in accordance with the practice of the Court; and therefore this motion must be refused with costs.

(1) 6 Beav. 121.

L.C. Jan. 14. } FOWLER *v.* JAMES.

Parties — Settlement — Next-of-Kin of party still living.

By marriage articles any property of the wife accruing during the coverture was to be settled in trust, after the death of the husband and wife, and in certain events, for the next-of-kin of the wife. A bill was filed by the wife against her husband and the trustee for the execution of the articles :—Held, that the parties who would be the wife's next-of-kin if she was then dead, were not necessary parties.

This bill was filed by Mrs. Fowler, suing by her next friend, against her husband and the defendant James, who was named as the trustee in the marriage articles afterwards mentioned.

By articles executed previously to the marriage of the plaintiff, it was agreed that all personal property to which she or her husband in her right might become entitled during the coverture, should be settled upon certain trusts for the plaintiff and her husband for their lives; and after their deaths, in case there was no issue of the marriage, and in default of appointment by the plaintiff, the property was to be in trust for such persons as, at the death of the plaintiff, would, under the statute for the distribution of the estates of intestates, be entitled to her personal estate in case she had died a widow and intestate.

Considerable sums were subject to these trusts, but no settlement had ever been executed.

The object of this suit was to have new trustees appointed (James being unwilling to act as a trustee), and to have a proper settlement executed, and the trust funds transferred to the trustees.

There was no issue of the marriage now living.

The cause came on to be heard before the Lord Chancellor as an original cause.

Mr. Cooper, for the defendant James, submitted to the Court, that upon the authority of the case of *Wardle* v. *Hargreaves* (1), the persons who at this time woul next-of-kin of the plaintiff if she v were necessary parties to the suit.

The LORD CHANCELLOR said it w tain who would be the plaintiff's ne at her death; and that to hold it to make those persons parties wl fill that character if she was now de be contrary to the rule *nemo est hæ tis.* He thought it was sufficient u circumstances to bring the tenan before the Court; and unless some a authorities could be adduced, he m rule the objection.

Mr. J. Parker, Mr. Stinton, *Rogers* appeared for different parti

(1) 11 Law J. Rep. (N.S.) Chanc. 126, and 1 Y. & Coll. C.C. 265, *nom.* Wardell *v.* Claxton.

L.C. Jan. 14. } *In re* TOWNSHEND.

Lunacy—Petition and Cross-I Right to begin.

Where two petitions are prese praying for the confirmation of the report, and the other in the nature tions to it, the counsel for the cros are entitled to begin.

In re Bariatinski, 1 *Phil.* 442, *Law J. Rep.* (N.S.) Chanc. 386, *ov*

In this case two petitions had sented, one praying for the confir the report of the Master in lunacy cross-petition raising objections to

Mr. Bacon, in support of the firs claimed the right to begin, on the of *In re the Princess Bariatinski* (

Mr. J. Parker, in support of petition, also claimed the right to

The LORD CHANCELLOR consid as the cross-petition was in the exceptions, the counsel in suppo petition ought to be heard first.

(1) 1 Phill. 442; s. c. 13 Law J. 1 Chanc. 386.

V.C. Feb. 18. L.C. Feb. 24. } DINGWALL v. HEMMING.

Discovery, Bill of—Costs—125th Order of May 1845.

The 125th Order of 1845 applies to a cross bill of discovery filed as a defence to a suit in equity, and not to a bill of discovery in aid or defence of an action at law, in which the defendant's costs will be payable according to the old practice, upon the filing of the answer.

The plaintiff in this suit had brought an action in January 1844 against Hemming and Stevens, as executors of Mr. M'William. The executors filed a bill against Dingwall, praying for an account of his receipts and payments on behalf of the testator, and for an injunction to restrain the action. The plaintiff afterwards filed a bill of discovery against Hemming (Stevens being out of the jurisdiction) in aid of his action at law. Hemming put in his answer, and obtained an *ex parte* order for payment of his costs. A motion was now made, on behalf of the plaintiff, for the discharge of the order for payment of costs.

Mr. Stuart and *Mr. Southgate*, in support of the motion, contended that under the 125th Order of May 1845 (1), the costs of a bill of discovery filed by a defendant to a bill for relief, were to be costs in the original cause, unless the Court should otherwise order. Before this Order the defendant in the original cause would have been entitled to his costs immediately upon putting in his answer to the cross bill; but the 125th Order was made for the express purpose of remedying this practice. The present bill was in the nature of a cross bill, and therefore came within the terms of the Order of May 1845. They cited

Westfield v. *Skipworth*, 1 Phil. 277; s. c. 12 Law J. Rep. (N.S.) Chanc. 431.

Mr. Bethell and *Mr. Willcock* opposed the motion, and contended that this was not a cross bill, but was filed simply for discovery in aid of the action at law. The plaintiff had not filed this bill in the character of the defendant in equity, and therefore the case did not come within the 41st Order of August 1841 (2). This bill did not refer to that which had been filed by the executors. It was perfectly distinct from that, and was filed against one only of the plaintiffs in the original bill. This suit could never be brought on with the original bill, and therefore was not in the nature of a cross bill, and did not come within the terms of the 125th Order of May 1845.

The VICE CHANCELLOR.—As the plaintiff Dingwall is now in custody, I think it will be better that I should not postpone my decision, as I might otherwise have done, for the purpose of consulting with the Lord Chancellor and the Master of the Rolls, but I will decide the case at once. I put out of consideration entirely the 41st Order of 1841, as it is in substance, though not in terms, repealed by the 1st Order of May 1845, which repeals all Orders which are inconsistent with the Orders of May 1845. The object of the 125th Order was to give more effectual relief than could have been obtained under the former Order. The matter appears to me to stand in this way:—A bill was filed to restrain Dingwall from prosecuting an action at law, and for the purpose of taking certain accounts. The injunction was obtained, but was afterwards dissolved, upon which Dingwall filed this bill for discovery against Hemming alone, in consequence of the other executor not being within the jurisdiction. Hemming has put in his answer, and it is to be observed that that answer might go far towards affecting the matters put in issue in the original cause filed by Hemming and Stevens; and it was obtained for the express purpose of sustaining the action which was sought to be restrained by the first bill. I do not see, under these circumstances, that it can be said that the bill of discovery is about a matter wholly separate from what the Court has to decide upon in the original suit. It

(1) Ord. Can. 335; 14 Law J. Rep. (N.S.) Chanc. 296.

(2) Ord. Can. 176; 10 Law J. Rep. (N.S.) Chanc. 414.

is, in fact, a bill filed in respect of that which is one of the material subjects of the original bill; and it appears to me, therefore, to come precisely within the terms of the 125th Order of May 1845, which directs that the costs of a bill of discovery are to be costs in the original cause, unless the Court otherwise orders. The order must consequently be discharged with costs.

The defendant moved before the Lord Chancellor that this order of the Vice Chancellor might be discharged.

Mr. Rolt and *Mr. Willcock* appeared in support of the motion, and

Mr. Bethell and *Mr. Southgate* opposed it.

The LORD CHANCELLOR said that the terms of the 125th Order clearly applied only to a bill of discovery filed by way of defence to a suit, and that the case must be regulated by the old practice; according to which the defndant in the bill of discovery was entitled to his costs upon putting in his answer. His Lordship was therefore of opinion that the order of the Vice Chancellor must be discharged.

L.C. March 20. } LEWIS *v.* HINTON.

Decree, Vacating Inrolment of—Caveat.

The Court will not vacate the inrolment of a decree on the ground of surprise, if the party inrolling has done nothing to mislead his opponent, and so induce him not to enter a caveat.

Immediately after the making of the decree in this cause, on the 26th of February 1847, the defendant's solicitor verbally informed the plaintiff's solicitor that he intended to present a petition of rehearing to the Lord Chancellor. He also, in order that there might be no delay, and at the request of the plaintiff's solicitor, furnished him with his own briefs in the cause, to enable him to pass the decree. The plaintiff's solicitor made use of the briefs for the purpose of getting the decree passed; and when that was done, he did not return them immediately, but kept them until he had procured the decree to be inrolled. Great dispatch was used by the plaintiff's solicitor in effecting this object, and he gave no intimation of his intention to the solicitor on the other side. Upon the briefs being subsequently returned, the defendant's solicitor was proceeding to take the necessary steps to present a petition of rehearing when he made the discovery that the decree had been inrolled. The defendant, therefore, moved before the Lord Chancellor to vacate the inrolment of the decree on the ground of surprise.

Mr. J. Parker and *Mr. Bird*, for the motion.—The plaintiff's solicitor ought to have returned the briefs immediately after he had succeeded in passing the decree, which was an object desired by both parties. The briefs were necessary to enable the defendant to prepare his petition of appeal, which the plaintiff's solicitor knew was to be presented. But he kept back the fact that the decree had been passed, and retained the briefs to throw the other party off his guard. The inrolment was, therefore, a surprise—*Stevens* v. *Guppy* (1). In *Anon.* (2) Lord Hardwicke opened an inrolment, because, though strictly regular, it was done too quickly.

[The LORD CHANCELLOR.—The Court will not do that now, on the mere ground of expedition being used, if there is no misleading. Both parties knew that the decree would be passed soon. Both were anxious to complete. The plaintiff's solicitor took the briefs to facilitate the getting the decree passed. The keeping of the briefs was of no consequence. It was a race between the parties. You must shew *mala fides*. It was the fault of your client in not entering a caveat.]

Mr. Rolt and *Mr. Glasse* opposed the motion, and cited—

Barnes v. *Wilson*, 1 Russ. & Myl. 486.
Balguy v. *Chorley*, 1 Myl. & K. 640.
Wardle v. *Carter*, 1 Myl. & Cr. 283; s. c. 5 Law J. Rep. (N.S.) Chanc. 224.
Dearman v. *Wych*, 4 Myl. & Cr. 550; s. c. 9 Law J. Rep. (N.S.) Chanc. 76.

(1) Turn. & Russ. 178.
(2) 1 Ves. sen. 326.

Mr. J. Parker, in reply.—Without the briefs the plaintiff's solicitor could not have got the decree passed, except upon both parties attending at the office. He kept the briefs until he had made sure of the inrolment.

The Lord Chancellor.—Where a party knows his opponent is going to present a petition of rehearing, he is quite justified in using despatch; there being an obvious course for the party to adopt who wishes to avoid going at once to the House of Lords, viz., to enter a caveat. If, however, the party intending to inrol does anything by which he induces the party objecting to the decree not to enter a caveat, and thus misleads him, the Court will not allow the inrolment to stand. In the present case, nothing of that kind took place, but the party being told that a petition would be presented, he then borrowed the briefs for a purpose common to both parties, in order to save trouble, and nothing was said. The party being probably aware of the rule of the Court, knew he must say nothing; and that if he thus acted, the adverse party could not say he deceived him. If he had said anything to induce a belief that no inrolment would be made, the case would have been similar to *Stevens* v. *Guppy*, but as he said nothing, it comes within the cases lately decided. A party is not responsible for a mistake his opponent may make.

L.C. March 26. } LANDER *v.* PARR.

Baron and Feme—Next Friend—Plaintiffs out of the Jurisdiction—Security for Costs.

The Court refused to change the next friend of a married woman who was residing out of the jurisdiction, though the next friend was a domestic servant of the solicitor conducting the suit, and it was alleged to be his suit; there being nothing to impeach the bona fides *of the parties.*

Whether the Court will order security for costs, where all the plaintiffs are out of the jurisdiction, but one of them sues by a next friend in this country—quære.

This was an appeal by the plaintiffs against a decision of the Master of the Rolls, under the following circumstances:—The plaintiffs in the suit were E. H. Lander, a married woman, by Harriet Warner, her next friend, together with her children, and the object was to establish a claim against some of the defendants, in respect of an alleged breach of trust with regard to a sum of stock in which Mrs. Lander had a life interest, for her separate use, under her marriage settlement, and to which her children were entitled in remainder. In the month of July 1846, prior to the commencement of the suit, Mrs. Lander, who was in very reduced circumstances, and living apart from her husband, was residing with a family in the character of a servant, and there became acquainted with Harriet Warner, who was a fellow servant in the same family. The solicitor to this family having advanced to the children of Mrs. Lander a sum of 3,000*l.* on the security of their reversionary interests in certain real estates, and having taken by way of collateral security a mortgage of their reversionary interests in the stock in question, had become acquainted with the alleged breach of trust. In July 1846 the family left England, taking Mrs. Lander along with them, and, being desirous to provide for Harriet Warner, prevailed upon their solicitor to take her into his service as cook. Harriet Warner was in good circumstances for a person in her situation of life, and had saved a little money. In December 1846, the before-mentioned solicitor, in whose service she was then living, had some conversation with her respecting Mrs. Lander's affairs, and obtained her consent to act as Mrs. Lander's next friend in the suit. Under these circumstances Mrs. Lander and her children being all out of the jurisdiction, the bill was filed, and the solicitor before referred to was made a defendant in respect of his mortgage security. R. H. Parr, one of the defendants, being the representative of a deceased trustee, by whom the alleged breach of trust was said to have been committed, thereupon moved, before the Master of the Rolls, that all proceedings as against him, R. H. Parr, might be stayed, until the next friend of the plaintiff E. H. Lander should have been changed, or the plaintiffs should have given security for costs. The Master of

the Rolls made an order accordingly, on the ground that the solicitor had taken advantage of the circumstance of Harriet Warner being in his service to induce her to sanction his prosecuting the suit in her name. The matter was now brought before the Lord Chancellor by way of appeal from this decision. It appeared from the affidavits of the solicitor and Harriet Warner, the next friend, that Mrs. Lander had left England in July for America, and that Harriet Warner had an interview with her the day before, and on that occasion promised to do anything in her power for Mrs. Lander or her children, but it did not appear that Mrs. Lander then contemplated instituting any suit.

Mr. Stuart and *Mr. Welford*, for the plaintiffs.—It is said the solicitor instituted this suit for his own benefit. The object of the suit is to set aside a deed relating to Mrs. Lander's life interest in a sum of stock. The security held by the solicitor does not extend to this life interest. He is a mere formal party, as holding a collateral security from the other *cestuis que trust*. If one plaintiff is in this country, it is not the practice to require security from the others.

They cited—

Dowden v. *Hook*, 8 Beav. 399; s. c. 14 Law J. Rep. (N.S.) Chanc. 383.
Anonymous, 1 Ves. jun. 409.
Ogilvie v. *Herne*, 11 Ves. 598.
Pennington v. *Alvin*, 1 Sim. & Stu. 264; s. c. 1 Law J. Rep. Chanc. 202.
Fellows v. *Barrett*, 1 Keen, 119; s. c. 5 Law J. Rep. (N.S.) Chanc. 204.

Mr. Freeling, contrà.—All the plaintiffs being abroad, security for costs is quite of course. The next friend ought to be changed. It is clearly not her suit. The retainer was given to the solicitor, who is the real plaintiff, on the very day on which the mortgage to him bears date.

Mr. Stuart, in reply.

[The LORD CHANCELLOR.—If a nominal party may be put on the record as next friend, it defeats the rule of the Court as to protection from costs. The cases cited in *Dowden* v. *Hook* do not raise the same question which arises in this case. Is there any decision where, all the plaintiffs being abroad, the Court has refused to order security for costs, on the ground that one of them sues by a next friend? It would be quite of course, but that here one sues by a next friend. You can search for authorities, and mention it again.]

Mr. Stuart having observed that he was not aware of any authority on the point; that the main question now was the removal of the next friend, as the solicitor was willing to give such security as he could, consistently with the rule preventing a solicitor from being security for costs; but he would deposit 100*l.* if that would be satisfactory.

The LORD CHANCELLOR.—It must go to the Master in the usual way. I can find nothing against the next friend; on the contrary, it seems to me to be an act of friendship to a person who has gone abroad. I cannot say I see anything against the conduct of the solicitor. As to his being interested, no doubt he is interested in the result; but notwithstanding that, he may very well be disposed to do justice to those on whose behalf he is acting. The order I shall now make will be an order by consent, that the plaintiff undertaking to give security for costs according to the practice of the Court, so much of the order of the Master of the Rolls as provided for changing the next friend be discharged. As I have varied the order, there will be no costs.

WIGRAM, V.C. March 22, 30. } NIGHTINGALE *v.* GOULBOURN.

Charity—Public Purposes.

A testator gave the money to arise from the conversion of all the residue of his personal estate to the Queen's Chancellor of the Exchequer for the time being, "to be by him appropriated to the benefit and advantage of my beloved country Great Britain":—Held, that this was a good charitable bequest.

A testator bequeathed the residue of his property as follows:—"I now desire that my said trustees or trustee shall convert all and singular my investments in the stocks, funds, and other securities, into money, and do and shall pay such money and all other

trust monies whatsoever remaining not disposed of, after payment of all and every the legacies, bequests, donations, and sums of money aforesaid, and all expenses attending the execution of this my will, to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain."

The Master found by his report that the residuary property, forming the subject of the bequest, consisted of 12,603*l.* 4*s.* Bank 3 per cent. annuities, 2,746*l.* 1*s.* reduced 3 per cent. annuities, and 1,572*l.* 18*s.* 6*d.* 3¼ per cent. annuities, 85*l.* 13*s.* 4*d.* long annuities, 461*l.* 1*s.* 2*d.* cash, and 300*l.* secured by a mortgage term.

The question on further directions was, whether this was a valid bequest for public purposes within the statute of Elizabeth, or whether the next-of-kin were entitled.

Mr. Twiss and *Mr. Wray*, for the Attorney General.—This is a gift to a public officer for a general public purpose, and as such will pass to the Crown to be disposed of by sign-manual. It is not necessary to contend here that the bequest is of a charitable nature, though there is sufficient in this case to shew that it is so; but where a gift is made to a public officer of the Crown for a general public purpose, the Crown will take it as part of the consolidated fund. In such a case it is a droit of the Crown in the hands of the trustee.

Middleton v. *Spicer*, 1 Bro. C.C. 201.
Shelford on Mortmain, 272, 273.

Mr. Romilly, *Mr. Hallett*, and *Mr. S. Bell*, for the widow and the next-of-kin.—It is not alleged, nor could it be sustained, that this is a beneficial interest in the Chancellor of the Exchequer. He is merely named as a responsible trustee. The trust is not for the Crown, but for objects which are too indefinite. The bequest is not expressly in exoneration of the national debt, as was the case in *Newland* v. *the Attorney General* (1); and by the terms of the will it could not be so applied, as Ireland would then participate in the benefits. The words of the bequest are large enough to enable the trustee to dispose of it for the purposes of private charity, liberality, or benevolence, for the encouragement of shipping, emigration, and a multitude of other purposes, which would not come within the definition of charitable purposes within the statute. The uncertainty of the objects will render the bequest void, and the next-of-kin will be entitled.

Browne v. *Yeall*, 7 Ves. 50, n.
Ommanney v. *Butcher*, Turn. & R. 260.
Morice v. *the Bishop of Durham*, 10 Ves. 522.
James v. *Allen*, 3 Mer. 17.
Vezey v. *Jamson*, 1 Sim. & Stu. 69.
Williams v. *Kershaw*, 1 Keen, 232, n.; s. c. 5 Law J. Rep. (N.S.) Chanc. 84.
Ellis v. *Selby*, 1 Myl. & Cr. 286; s. c. 4 Law J. Rep. (N.S.) Chanc. 69.
Kendall v. *Granger*, 5 Beav. 300; s. c. 11 Law J. Rep. (N.S.) Chanc. 405.

In *Mitford* v. *Reynolds* (2), the gift was for the benefit of the inhabitants of a particular city; in the present case the magnitude and extent of the objects makes it impossible for the Court to execute the trust.

March 30.—WIGRAM, V.C.—The question in this case is, whether the Attorney General can support the bequest as a valid charitable bequest, or whether the property comprised in it is undisposed of, and as such distributable amongst the next-of-kin of the testator. The argument in favour of the Attorney General was, that the bequest being to the country at large, no application of the money would be lawful other than for a general public purpose, and that such would be a charitable purpose within the statute of Elizabeth. The argument for the next-of-kin was, that the words of the bequest are so general as to admit of the application of the property by the trustee to purposes not charitable within the statute. If by the decided cases it can be shewn that the trustees would have such a power as the next-of-kin have contended for, there is an end of the question; but to assume that would be to take for granted the very question in contest in the cause. In the course of the argument I hazarded the observation that in all the reported cases in which the word "charity" was not used, and in which the Court had decided

(1) 3 Mer. 684.

(2) 1 Phil. 185; s. c. 12 Law J. Rep. (N.S.) Chanc. 40.

in favour of charity, some definite purpose had been specified in the will, and the Court had decided whether the purpose so specified was a charitable purpose or not. I should not have referred to this, but I have since observed that my suggestion was sanctioned by the highest authority, that of Sir William Grant (3); but I do not think Sir William Grant intended to decide that no general words would be equivalent to the word "charity;" nor, if I am right in that, do I think it would be right, in reference to the decided cases, to lay down any such general rule. In *West* v. *Knight* (4), a bequest to the parish of Great Creaton, where the testator was born, was held to be a charitable bequest, to be applied for the benefit of the poor of the parish named, upon the express ground that it was within the statute. In *Jones* v. *Williams* (5), Lord Camden held that any general public purpose, extending to the poor as well as to the rich, was a charitable use within the statute. In *The Attorney General* v. *the City of London* (6), a bequest of residue to be laid out for charitable and other good uses, was held a good charitable bequest; and upon the authority of that case, a bequest of 2,000*l.* to be laid out till the testator's son come of age, "in the service of my Lord and Master, and I trust Redeemer," was held a good charitable bequest—*Powerscourt* v. *Powerscourt* (7). In *The Attorney General* v. *Heelis* (8), Sir John Leach, referring to the case of *The Attorney General* v. *Brown* (9) as a case in which he had had occasion to consider the subject very fully, stated it to be his opinion that funds supplied from the gift of the Crown, or from the gift of the legislature, or from private gift, for any legal public or general purpose, were charitable funds to be administered by courts of equity, and that it was not material that the particular public or general purpose was not expressed in the statute of Elizabeth, all other legal public or general purposes being within the equity of that statute. That case was the subject of observation

(3) 9 Ves. 406.
(4) 1 Cases in Chanc. 134.
(5) Amb. 651.
(6) 1 Ves. jun. 243.
(7) 1 Moll. 616.
(8) 2 Sim. & Stu. 67; s. c. 2 Law J. Rep. Chanc. 189.
(9) 1 Swanst. 265.

before Lord Eldon in *The Att* v. *the Mayor of Dublin* (10), there said again became the s servation in *The Attorney G Mayor and Corporation of* I do not collect from those c law laid down in *The Attorn Heelis* was disapproved of by In *The Attorney General* v. *Lonsdale* (12), property was testator for the maintenance a the schoolmasters of the fre which he had erected a house and for the management of t upon such trust and for suc settle the same upon trustees ner, and under such laws, constitutions as to his exec seem meet and expedient, or ot such trusts and for such other his executors should think mo to the good of the county of W and especially of the parish The charity as to the school gether failed, the testator havi to found the schoolhouse in Court nevertheless held the and directed the property to other charitable purposes for the county of Westmorelan words of the bequest been "c my executors shall think fit," ing to the cases cited in argu could not have been supporte As it stands, the gift amount direction to apply the proper of the county, without any r word "charitable." In *Mitf* the testator bequeathed the property "to the governmen the express purpose of th applying the amount to ch cial and public works, at an Dacca in Bengal, the intent and direction being, that th be applied exclusively to th native inhabitants in the m the government may regard ducive to that end." If the table, beneficial, and publ case to be read conjunctiv question that charity will g

(10) 1 Bligh. (N.S.) 334.
(11) 2 Sim. 437.
(12) 1 Ibid. 105; s. c. 5 Lav

bequest. If, however, they are to be taken distributively, so that the fund might be applied either to charitable, or to beneficial or to public works without reference to charity, there would be an end of the argument the other way. The Lord Chancellor, in delivering judgment, admits that in the latter case there could be no doubt, and he then goes on to shew that the bequest before him, even upon the hypothesis that the words are to be taken distributively, may still be supported as charitable. He says:—"The money is to be applied to charitable, beneficial, and public works, at and in the city of Dacca in Bengal. If these words, as it is contended upon the authority of *Williams* v. *Kershaw*, are to be taken distributively, and not conjunctively, and any one of the purposes or of the alternatives would not constitute a valid charitable bequest, the whole disposition will, of course, fail. Upon that point no doubt can be entertained. But this is not the whole of the bequest, because the testator goes on to say that it is his intent that the money shall be applied exclusively to the benefit of the native inhabitants of Dacca. Taking, therefore, the whole together, the meaning, as I understand it, is this, that the money shall be applied to works—by which I understand something to be constructed or established—for the benefit of the native inhabitants of Dacca; not for any particular class of the native inhabitants, but for all the native inhabitants in general, both rich and poor; and I think within all the authorities this constitutes a valid charitable bequest." I only mean to guard myself against the construction that the Lord Chancellor considers the word "charitable" to apply to the whole of the bequest. If he did, there would have been no question. The Lord Chancellor rejects that word, and says that the bequest is for the benefit of all the native inhabitants in general, both rich and poor, and was, therefore, a good charitable bequest. The cases of *Howse* v. *Chapman* (13) and *Townley* v. *Bedwell* (14), which are also cited in *Mitford* v. *Reynolds*, for the purpose of explaining the ground upon which the judgment was founded, are also important upon the present question. In another case, that of *Newland* v. *the Attorney General*, in which there was a bequest of stock "to His Majesty's Government in exoneration of the national debt," Lord Eldon directed it to be transferred to such person as the King, under his sign-manual, should appoint. These cases, at least, establish that the argument for the next-of-kin is not to be taken for granted without consideration. It was said that if I should decide against the claim of the next-of-kin, my decision would be opposed to that of Lord Langdale in *Kendall* v. *Granger*. I am not of that opinion; I agree with Lord Langdale that many things of general utility may not fall within the definition of charity, as the term is understood in this court; for many things of general utility may be strictly matters of private right, although the public may indirectly derive a benefit from them. The expenditure of money in the encouragement of railroads (for example), being strictly private property, and over which the Attorney General could have no controul, might be an expenditure in the encouragement of things of general utility, but not an expenditure for a charitable purpose. But this case is distinguishable from that of *Kendall* v. *Granger*. This is not simply a bequest to trustees for general purposes, but for the benefit and advantage—that is, for the good—of a particular class; a large one, it is true, but a class within the decision of *Mitford* v. *Reynolds*. If a bequest were made to a trustee to be appropriated at his discretion for the benefit and advantage of A. B., that in equity would be a bequest to A. B. In this case A. B. is the British public. But it has not been argued that that difference alone was fatal to the bequest. I am of opinion that the bequest is valid, unless it can be shewn that the Chancellor of the Exchequer, consistently with this will, could appropriate the fund to purposes in which the British public has no direct interest,—no interest except incidentally and indirectly; or, in fact, to any other than general public purposes. I cannot conceive a purpose to which the funds in this case could be lawfully applied, according to the will, which would not be so general and public as to be under the

(13) 4 Ves. 542.
(14) 6 Ibid. 194.

protection of the Attorney General. The case may be open to some doubt, but such is the conclusion to which I have come.

WIGRAM, V.C.
1844.
Nov. 29.
1845.
March 13, 14;
April 15;
Nov. 7, 8, 10;
Dec. 5.
1846.
Jan. 19, 23.
1847.
Jan. 20; Feb. 20.

DAWSON *v.* PAVER.

Injunction — Prospective Injury — Form of Issue—Local Inclosure Act, Construction of—Powers of Commissioners—Rights of Strangers.

An act empowering commissioners therein named to inclose certain lands in the township of A, and reciting that it would be of great advantage to the proprietors of such open lands that the same should be allotted and divided, enacted, that it should be lawful for the commissioners to set out and make such ditches, watercourses, &c., of such extent and form, and in such situations as they should deem necessary in the lands to be inclosed, and to enlarge and improve any of the existing watercourses, &c.:—Held, that the commissioners were not thereby justified in draining the water from the lands to be inclosed into an ancient watercourse running through the township of B. into the township of A, so as to obstruct the drainage of the plaintiff's lands in the township of B, by means of the said ancient watercourse, to his damage and injury.

Where an act is limited in its operations to a particular place, and is expressed to be for the interest of a particular class of individuals, and the parties interested are empowered in general terms to do certain acts, the Court will not construe this as a power to interfere with the rights of strangers to the act, unless the intention of the act to affect such rights can be collected from the express words or by necessary implication.

The question whether an act be public or private is to be resolved not by any formal considerations, ex. gr. whether there be a clause declaring it shall be deemed a public act, but by the substance and nature of the case.

On a bill alleging a case of prospective injury, an injunction was granted, restraining the defendants from permitting certain injurious effects to be produced by certain given causes. The contemplated damage took place, and the plaintiff moved to commit for breach of the injunction, whereupon the defendants denied that the damage was effected by their acts. The Court refused to treat the defendants as contumacious until the verdict of a jury had conclusively connected the acts of the defendants and the damage alleged to have resulted therefrom as cause and effect.

By an act for inclosing lands in the township of Cliffe-cum-Lund in the parish of Hemingbrough, in the county of York, reciting that there were, within the township of Cliffe-cum-Lund, divers open and common fields, and divers open commons and waste lands, and divers inclosed lands and homesteads, and that the said open and common fields and the said commons and waste lands were in their present state incapable of any considerable improvement, and it would be of great advantage to the proprietors thereof, and persons interested therein, to have the same divided and inclosed, &c., but that the purposes aforesaid could not be effected without the authority of parliament, and enacting that the General Inclosure Acts, 41 Geo. 3. c. 109. and 1 & 2 Geo. 4. c. 23, should, as far as they were applicable, be deemed to be a part of the present act, it was enacted, "that C. Paver, of &c., and M. Durham, of &c., and their successors for the time being to be elected or appointed in manner hereinafter mentioned, shall be commissioners for carrying this act and the said recited acts into execution, and it shall be lawful for the commissioners, and they are hereby required to divide, allot and inclose the said open and common fields, and the said commons and waste lands in the said township of Cliffe-cum-Lund, according to the regulations and provisions contained in the said recited acts and this act;" "that it shall be lawful for the commissioners to set out and

make such common ponds, ditches, watercourses, tunnels, banks, and bridges of such extent and form, and in such situations as they shall deem necessary in the lands to be inclosed, and also to enlarge, cleanse, or alter the course of, and improve any of the present ditches or watercourses, banks, or bridges, as well in and over the same lands, as also in any ancient inclosures or other lands in the same township as the commissioners shall deem necessary (making such satisfaction to the proprietors of such ancient inclosures or lands for the damage done thereby as the commissioners shall think just), and the expenses of making and enlarging, altering, and cleansing such ponds, ditches, watercourses, tunnels, banks, and bridges, when the same shall be first done in pursuance of this act, if not otherwise provided for, shall be raised by the commissioners in the same manner as the other expenses of carrying this act into execution; but all such ponds, ditches, &c. shall at all times afterwards be repaired, cleansed, and maintained by such persons, and in such manner as the commissioners shall by their award direct; provided that no watercourse be diverted or turned without the consent in writing of the person from whose lands the same may be diverted, and of the person into whose lands the same may be turned, or to the prejudice of any person interested in such watercourse, except with his consent in writing." "That if any person shall think himself aggrieved by anything done in pursuance of this act (except as to the allotments, and except as to such other determinations as are by the first recited act or this act directed to be final, and except such cases wherein an issue at law shall be tried as hereinbefore is mentioned) he may appeal to the General or Quarter Sessions of the Peace which shall be held for the East Riding of the county of York within four months next after the cause of complaint shall have arisen, on giving to the commissioners and to the party concerned ten days' previous notice in writing of such appeal, and of the matter thereof; and the Justices in such sessions assembled are hereby required to hear and determine the matter of every such appeal, and to make such order therein, and to award such costs and damages as to them shall seem reasonable; and the costs and damages, &c. shall be levied by distress, and the said Justices shall issue their warrant accordingly," &c. "That every order and determination of the said Justices upon every such appeal shall be final, and shall not be removed or removeable by *certiorari*, or any other writ or process whatsoever, into any of her Majesty's courts of record at Westminster or elsewhere." "Saving always to the Queen's most Excellent Majesty, her heirs and successors, and to the Right Rev. the Lord Bishop of Ripon, and to all other persons, bodies politic, corporate, or collegiate, their heirs, successors, executors and administrators, all such estate, right, title, and interest, claim and demand (other than and except such as are expressly barred and compensated for or intended to be barred and compensated for and extinguished by this act,) which they or any of them could or might have had in, to, or in respect of the lands hereby authorized to be divided, allotted and inclosed in case this act had not been passed." "That a copy of this act, printed by the Queen's printer, shall be admitted as evidence."

The plaintiff was the owner of lands in the township of Osgodby, which adjoins the township of Cliffe-cum-Lund. An ancient drain or watercourse ran from and through the plaintiff's lands in the township of Osgodby, and thence into Cliffe Common in the township of Cliffe-cum-Lund, and thence into an adjoining township, until it finally emptied itself into the river Derwent. The defendants Paver and Durham, the commissioners appointed by the act, for the purpose of more effectual draining and otherwise improving the lands to be inclosed, proposed and proceeded to mark out and cut new drains on the waste lands of Cliffe-cum-Lund, which should carry the water off those waste lands from different points into the ancient watercourse proceeding from and through the plaintiff's lands in Osgodby.

In November 1844 the plaintiff filed his bill against the Commissioners, alleging that the plaintiff had, in the month of September previous, represented to the Commissioners that the effect of the new drains, if completed according to the plans marked out, would be to impede the accustomed flow of water along the ancient watercourse; but that, nevertheless, the defendants had, in accordance with and in pursuance of their plans,

cut a deep drain in the waste lands of equal or greater dimensions than and communicating with the ancient watercourse; that the lands intended to be drained thereby, being situated on a higher level than the plaintiff's lands, the effect would be to introduce into the ancient watercourse a larger volume of water than it was capable of carrying off, and by that means obstruct and dam up the accustomed flow of water from the plaintiff's land; and that in case of heavy rains the anticipated mischief would occur from the one drain already cut; and that, if the plans of drainage adopted by the defendants were fully carried out, irreparable mischief would be done to the plaintiff.

The bill prayed that the defendants might be restrained from cutting, making, or completing any drains, &c. in the township of Cliffe-cum-Lund which should empty themselves or flow into the ancient watercourse, and from causing or permitting water to flow into the drain already cut so as to surcharge or increase the water in the ancient drain on the plaintiff's lands, with water flowing from any of the lands in Cliffe-cum-Lund, or so as at any time to obstruct, force back or impede the free passage and flow of water from the plaintiff's lands in Osgodby, along the ancient watercourse, in like manner as the water therefrom had theretofore been anciently accustomed to flow.

In November 1844 an injunction was granted on a motion *ex parte* restraining the defendants, their servants, &c. from permitting water to flow into the ancient watercourse through the drain then lately cut into the same or any other drain, so as to obstruct the drainage of the plaintiff's lands by means of the ancient watercourse, in such manner as the same had been theretofore used and enjoyed by the plaintiff, until answer or further order.

On the 13th of March 1845 the defendants moved to dissolve the injunction. By the affidavits it appeared that the arch of "Lara Bridge," which was situated at a short distance below the point where the new drain was brought into the ancient watercourse, was barely sufficient to allow of the passage of the water before the additional stream from the new drain was poured into it; but that the arch might be widened at an inconsiderable expense to allow of the passage of the increased volume of water poured into it by means of the new drain. The case stood over to see if the defendants could come to any arrangement; and on the 15th of April the Court made the following order on the motion:—The defendants, by their counsel, declining to make any alteration in the course of drainage, or to widen, or defray the expense of widening, Lara Bridge (the plaintiff by his counsel offering to consent to the bridge being so widened), or to undertake hereafter to do any such acts in case the same should obstruct the drainage of the plaintiff's land by means of the ancient watercourse in such manner as, &c.; this Court doth order that the parties do proceed to a trial at law, &c. before a special jury on the following issue, viz. "whether the drainage made or effected or intended to be made or effected by the defendants into the ancient watercourse will, or would, if completed, to the damage and injury of the plaintiff, obstruct the drainage of the plaintiff's lands by means of the ancient watercourse in such manner as," &c. The plaintiff in equity to be plaintiff at law; the defendants to admit the title of the plaintiff to the lands in Osgodby, with liberty to indorse any special matter on the *postea*. The injunction to be continued until the hearing or further order, and the motion and the question of costs to stand over till the trial of the issue, with liberty to apply. The issue was tried, but, the trial not being satisfactory, the Court directed a new trial of the issue upon the application of the defendants.

In December 1845, considerable rain having fallen, and being conducted into the ancient watercourse by the new drains or some of them, the plaintiff's lands were flooded, whereupon the plaintiff moved to commit the defendants for breach of the injunction.

Mr. Anderdon, *Mr. Romilly*, and *Mr. Crawford*, for the motion.

Mr. K. Parker, *Mr. Malins* and *Mr. Shee*, contrà.

January 19th, 1846.—Wigram, V.C.—The bill in this case stated a case of prospective injury, none being yet done, and therefore the plaintiff could not try his right

by an action at law. If he had waited till the injury was done, he might have been told that he was too late, and that an action for damages was the proper remedy; if he had waited till the commissioners had made their award, there would have been nobody against whom he could have proceeded for protection. It was a case which admitted of scientific proof from the nature of the levels of the lands. In every point of view it appeared to me to be a case for the prospective assistance of a court of equity, if the allegations of the bill were well founded. An injunction was applied for *ex parte*. I did not think it right to grant the injunction in the terms asked, but I made an order which simply directed that the defendants should not permit the water from the new drain to flow into the ancient watercourse, so as to obstruct the drainage of the plaintiff's lands by means of the said watercourse, in the same manner as the same had been heretofore used and enjoyed by the plaintiff. I framed the order in that mode by way of caution merely to the defendants, that they might be made aware of the strict right which the plaintiff claimed. The motion to discharge that order was not made until April 1845. On the motion to dissolve the injunction in April 1845, as no actual experience had been had of the effect of the new drains owing to the dryness of the season, I thought it right not to restrain the defendants from the exercise of a legal right without the verdict of a jury; and I directed an issue in form similar to that directed by Lord Eldon in the case of *Blakemore* v. *the Glamorganshire Canal Company* (1), that is, whether the drains, if opened, would have the effect of flooding the plaintiff's lands; and I did that, because the defendants refused to come under what I thought very reasonable terms, namely, that they should simply undertake to alter their drainage if the injury contemplated should, in fact, happen. If at that time any injury had happened, there would have been no impediment to the plaintiff bringing an action. This is a course which is sanctioned by modern practice when the Court wants information. In January 1845 the issue was tried, and a verdict was found in favour of the plaintiff, which was not quite satisfactory to my mind. After the trial violent rains fell, and the plaintiff's lands were flooded. In November 1845 two motions were made before me, one by the plaintiff to restrain the defendants from the use of their present drains, and the other a cross motion by the defendants for a new trial. I thought the verdict was not so satisfactory to me (not being founded on actual experience), that I could act upon it for the purpose of an injunction. I therefore directed a new trial, in order that, after the expiration of the winter months, a verdict might be obtained as the foundation of a perpetual injunction; and I thought it best not to alter the form of the present injunction. From the time of this order till the 18th of December last, the weather continued dry, but on the 18th of December there came on the ordinary rain, and again the consequence was that the plaintiff's lands were flooded, which they never had been since July 1843. The plaintiff then moved to commit the defendants for breach of the injunction. The point made by the defendants was, that the flooding was not occasioned by the new drain. My opinion is, that what took place in December last corroborates the verdict of the jury so far as to entitle the plaintiff to ask that the drainage which was opened in April last shall not be allowed to continue in its present state until the question in the cause shall have been decided; the rain which then fell being of ordinary amount, such as might be expected to fall in every year. But two questions of form occurred to me upon this application; first, the order which I am asked to make upon this motion is one which compels the defendants to undo what they have done, or to make an additional exit for the water before the hearing of the cause; secondly, this is a motion to commit a party, not for doing an act which he was in terms restrained from doing, but because a particular thing has taken place which might have happened substantially to the same extent if the new drain had not been made. On the first point there is no difficulty, for the acts especially complained of have been done since the injunction; and if there is any case in which the Court might make such an order, it must be in a case of this description; and it is not suggested that the defendants are unable to prevent the evil until the hearing

(1) 1 Myl. & K. 154; s. c. 2 Law J. Rep. (N.S.) Chanc. 95.

of the cause. On the second point there is the greatest possible difficulty. The injunction does not in terms restrain the defendants from doing any specific act, but it restrains them from permitting a certain effect to be produced by a given cause. There is nothing yet which entitles the plaintiff to say, conclusively, that the injury results from the defendants' new drain. The verdict which has been given would in one case connect the two things as cause and effect; but, as to that, I have directed a new trial. Still, if the defendants, knowing that flooding would be the consequence, had permitted their new drain to continue open, I should have no difficulty in saying that they were guilty of wilful disobedience to the order of the Court. But unless I am prepared to say that the defendants are not acting *bonâ fide* in saying that the injury arises from other causes, it would be a strong measure to treat them as contumacious until I had first decided that which would leave no room for doubt in the matter; and it was for that reason that on a former day I doubted whether I could treat the defendants as contumacious, after the order for a new trial. It is, however, quite consistent with this that I should, without giving any opinion upon that right, hold that the new drain ought not to remain until the right is decided, or until it is shewn by experience that closing the new drain will not have the effect of restoring the plaintiff to the position he was in before April 1845. But no injunction founded upon that has yet been granted, and the difficulty of making the order on the motion in its present form is not removed. The better way will be to let the motion stand over, with liberty to amend the notice of motion for the purpose of making it in the alternative for an extended injunction.

A motion was afterwards made for an extended injunction, which was ordered.

On the second trial of the issue in 1846, the jury found that the new drainage already done did obstruct, and that the proposed drainage when completed would obstruct the plaintiff's drainage to his damage.

On the 20th of January 1847 the cause came on for hearing. No evidence was gone into on either side, but the plaintiff relied on the answer of the defendants, and the verdicts upon the two issues.

Mr. Anderdon, *Mr. Romilly* and *Mr. Crawford*, for the plaintiff, contended that the verdict upon the issues was decisive of the question in the cause—*Lewis* v. *Thomas* (2), *Robinson* v. *Lord Byron* (3), *Kent* v. *Burgess* (4). That the act, under which the defendants proceeded, was a private act, not binding on strangers; and that the clause that a copy printed by the King's printer should be received in evidence proved it to be a private act. Upon the question of costs they cited—

Blackburn v. *Gregson*, 1 Bro. C.C. 420.
White v. *Wilson*, 13 Ves. 87.

Mr. K. Parker, *Mr. Malins*, and *Mr. Shee*, for the defendants, contended that the verdicts in the issues were not sufficient evidence to sustain the bill at the hearing. Secondly, that making the injunction perpetual would in fact be to repeal an act of parliament; that it was no objection to the acts of the commissioners, so long as they were within the powers given to them by the legislature, that such acts were prejudicial to the rights of individuals, at least so long as the commissioners exercised their discretion *bonâ fide*—*Priestley* v. *Manchester and Leeds Railway Company* (5), *Aldred* v. *the North Midland Railway Company* (6), *Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (7), *Attorney General* v. *the London and Southampton Railway Company* (8), *London and Birmingham Railway Company* v. *the Grand Junction Canal Company* (9), *Sutton* v. *Clarke* (10), *Duncan* v. *Findlater* (11). The act was to be regarded as a public act, being incorporated with two acts confessedly public—*Hargreaves* v. *the Lancaster and Preston Junction Railway Company* (12).

(2) 3 Hare, 26.
(3) 2 Cox, 459.
(4) 11 Sim. 372; s. c. 10 Law J. Rep. (N.S.) Chanc. 100.
(5) 2 Rail. Cas. 134.
(6) 1 Ibid. 404.
(7) 4 Term Rep. 794.
(8) 1 Rail. Cas. 302; s. c. 7 Law J. Rep. (N.S.) Chanc. 15.
(9) 1 Rail. Cas. 224.
(10) 6 Taunt. 29.
(11) 6 Cl. & Fin. 894.
(12) 1 Rail. Cas. 416.

Feb. 20, 1847.—WIGRAM, V.C.—Where an act of parliament, in express terms or by necessary implication empowers an individual to take or interfere with the property of another, and it appears to the Court upon a sound construction of the act that such was the intention of the legislature, the Court is bound to give effect to the decrees of the legislature, when thus clearly expressed. But where an act of parliament simply enables an individual or individuals to deal with property of his or their own for their own benefit, and does not in express terms or by necessary implication empower him or them to take the property or to interfere with the rights of others, the case is determined upon very different considerations. In the latter case, the distinction between a public and a private act of parliament becomes very material. Public acts, as it is laid down in the books, bind all the Queen's subjects; but private acts, that is, local and personal acts, as it is said, do not bind strangers, unless such intent is apparent in the act, either by express words, or by necessary implication; and whether an act is public or private does not depend upon any such formal considerations as whether it has a clause declaring that it shall be deemed a public act, but upon the substantial considerations of the nature of the case—*Barrington's case* (13), *Lucy* v. *Levington* (14). That the act in this case is local and personal is beyond dispute. Its operation is confined to a particular place, and it is expressed to be for the benefit of certain specified individuals, namely, those who have personal interests in the property which it is the object of the act to improve. The act then goes on to appoint commissioners, empowers them to inclose, and then contains the clause as to drainage upon which the defendants found the right for which they have contended in this suit. The plaintiff is a stranger to the act. The questions which have been argued are two; first, whether the general power to drain in the 27th clause of the act gives the persons interested in the land to be inclosed through the commissioners larger powers against the plaintiff than they had previously to the passing of the act, so as to enable the commissioners to do damage to strangers, which the proprietors of the land could not have done without the act; and, if so, secondly, whether those larger powers have been duly exercised in the present case. I thought it right in a former stage of the proceedings, to let the defendants know what my opinion upon this point was, though I did not think it right then to act upon the opinion I expressed. I directed an issue, in the form of the issues directed by Lord Eldon, after great consideration in the case of *Blakemore* v. *Glamorganshire Canal Company*. In the cases cited for the defendants, it will be found, that the acts, under which the defendants proceeded, empowered them either in express terms or by necessary implication, to interfere with the rights of the complaining parties in the way complained of. *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith*, *Sutton* v. *Clarke*, *Boulton* v. *Crowther* (15). In all those cases, the purposes of the statute were of a *quasi* public nature, and the necessary object of the statute was to enable the defendants to interfere with private rights, and express and definite powers were given for that purpose. In the case of *Riddle* v. *White* (16), the principle of the decision was, that the Court could not go against the express words of an act of parliament. *Stead* v. *Carey* (17) was decided upon the like ground. But all these cases leave the proposition untouched—that an act of parliament, not being a public act, will not bind the rights of strangers unless by express words, or by necessary implication, the intention can be collected. It is a question of construction. Now, in the present case, from what can an intention on the part of the legislature be necessarily implied to empower the owners of and persons interested in the lands to be inclosed to interfere with the existing rights of strangers? Omitting the consideration that the commissioners are officers having no interest in the lands, the question admits of but one answer. Does the appointment of commissioners alter the case?

They were appointed, not for the purpose

(13) 8 Rep. 138, *a*.
(14) 1 Vent. 175.

(15) 2 B. & C. 703; s.c. 2 Law J. Rep. K.B. 139.
(16) 4 Gwill. 1387.
(17) 1 Man. Gr. & Sc. 496; s.c. 14 Law J. Rep. (N.S.) C.P. 177.

of invading the rights of strangers, but because such machinery was necessary for working out the purposes of the act as between the parties interested in the lands to be inclosed. I do not impugn the doctrine that the commissioners, acting to the best of their judgment, are not to be charged with damages consequential upon the acts they are empowered to do. But what have they power to do? How the fact of the appointment of commissioners is an answer to that question I am at a loss to understand. But the verdict covers not only that, but every question that can be made in the case. The verdicts are wrong if the defendants' argument is right. I am bound, therefore, to make a decree for the plaintiff. The plaintiff has not gone into any evidence by which, in this stage of the cause, I can be informed of those details by which my judgment was governed in the earlier stages, and by which the frame of the decree might be regulated. The two verdicts constitute the plaintiff's sole evidence in the cause; and though I may use the interlocutory proceedings for the purpose of informing myself what those verdicts have decided, I cannot make use of them for any further purpose. Those verdicts decide that the plaintiff is damaged by the present state of the defendants' drains, but nothing more. This makes it difficult to frame a decree which shall not be open to the objection, either that it improperly restrains the powers of the commissioners, or that it is based upon assumptions not warranted by the evidence before me. I can only make a decree which the plaintiff's possession, coupled with the verdicts, will support.

The decree declared that the defendants, in exercise of the powers given them by their act, were not at liberty to set out, make, or use, any drain whereby the drainage of the plaintiff's lands, by the ancient watercourse, as the same had heretofore been enjoyed by the plaintiff, would be obstructed. And the defendants were restrained from using their drain for the purpose of draining the water from oxgangs in the Cliffe, &c., into the plaintiff's ancient watercourse, in the present or any altered condition of that drain, without providing for the extra water so brought in an outlet sufficient, &c. Tax the costs of the plaintiff of these suits (except the costs hereinafter mentioned), and the costs of the issues and of the motion for a new trial; and tax the costs of the defendants on the motion to commit, and on the motion for the costs of the issues, and let the last-mentioned costs be deducted from the costs first directed to be taxed; the balance to be paid by the defendants to the plaintiff.

K. BRUCE, V.C. March 19. } HILL *v.* MAURICE.

1 *Will.* 4. *c.* 47.—*Creditors' Suit—Repairs.*

The Court has no authority under the 1 *Will.* 4. *c.* 47. *to direct money to be raised by mortgage of the testator's real estate, for the purpose of putting any part of such real estate into repair.*

This was a creditors' suit. The testator in the cause, by his will, dated in 1832, devised all his real estate to Mr. Langley, one of the defendants, for life, with remainders over. A part of the real estate of the testator consisted of a house, which was very much dilapidated and out of repair. By a decree made in the suit the Master was directed, by sale or mortgage of the testator's real estate, to raise such a sum as would satisfy his debts, which amounted to about 800*l.* The Master approved of a scheme for raising the sum required by mortgage.

The plaintiffs now presented a petition, praying that in addition to the sum of 800*l.* the sum of 120*l.* might be raised by mortgage, and laid out in putting the house in repair.

Mr. G. L. Russell, for the petition, cited the 1 Will. 4. c. 47. s. 12. and 2 & 3 Vict. c. 60. s. 1, and *Garmstone* v. *Gaunt* (1).

Mr. Headlam, for the tenant for life, did not oppose the petition.

KNIGHT BRUCE, V.C., said that he thought he had not power to direct that money should be raised by a mortgage of the inheritance for the purpose of putting the property into repair.

(1) 1 Coll. 577; s.c. 14 Law J. Rep. (N.S.) Chanc. 162.

V.C. March 4. } GACHES v. WARNER.

Legacy—Vesting of Shares—Proof of Legitimacy.

A testator bequeathed 10,000l. to his brother, to be paid in twenty equal half-yearly payments, but in case his brother should die before all the payments became due, then the remainder should be placed out at interest, to be paid to the children of his brother till they attained twenty-one, and then the principal to be divided amongst them. The brother died after three payments had been made, leaving five children, one of whom was supposed to be dead, not having been heard of for thirty years. Four of the children received their shares, and filed a bill praying that the remaining share might be divided amongst them. There was no evidence of the brother's marriage:—Held, that there was sufficient evidence of the legitimacy of the children, and that each was entitled, upon attaining twenty-one, to a share in the residue, but inquiries were directed as to the death of the child who had not been heard of.

Samuel Buckle, by his will, dated the 29th of May 1813, gave and bequeathed unto his brother, William Buckle, the sum of 10,000*l.*, to be paid by his executors and trustees therein named, by twenty equal half-yearly payments, but in case of the death of the said W. Buckle before all the said payments of the said sum of 10,000*l.* should have become due, then the said testator directed that the remainder thereof should be placed out at interest by his executors, such interest to be paid to the said W. Buckle's children till they respectively attained the age of twenty-one years, and then such principal to be divided amongst them, share and share alike; and thet estator thereby appointed Charles Warner, George Platel, and Henry Freeman, trustees and executors of his will.

The testator died in June 1813, and the executors made three different half-yearly payments of 500*l.* each to his brother, W. Buckle, after which the said W. Buckle died, leaving four daughters and one son. The son had not been heard of since the year 1816, and was therefore supposed to have died. Each of the daughters was paid one-fifth part of the remaining 8,500*l.* upon attaining the age of twenty-one, and releases were signed by them for the whole of their interest under the will.

This suit was instituted by the daughters and their husbands for the purpose of compelling the trustees to pay over to them the share to which their brother was entitled.

The defendants stated, that they were willing to pay over the remaining sum, but their reason for not doing so was that there was no evidence whether the son of W. Buckle was really dead or not; and further, that there was no evidence of the marriage of William Buckle, and therefore it had not been proved that his children were legitimate. It was also submitted that, under the will of the testator, the children were not entitled to the whole of the remaining sum of 8,500*l.* immediately upon the death of their father, but that the division was to take place when the youngest should attain twenty-one. On these grounds a reference to the Master was asked on behalf of the trustees.

Mr. Bethell and *Mr. Lake Russell* appeared for the plaintiffs; and

Mr. Anderdon, Mr. Selwyn, Mr. Greene, and *Mr. Kinglake,* for the defendants.

The Vice Chancellor.—The first question is, whether there shall now be an inquiry as to the legitimacy of the children. I do not see that any new fact could be ascertained. There has been no doubt thrown upon the validity of the marriage, except that they are unable to produce the certificate; but suppose this were to be tried by a jury, and nothing were to be laid before them beyond the evidence already produced, I do not see how they could come to a decision that the children were illegitimate. The testator himself names them as the children of his brother William, and it appears that the executors themselves dealt with them as if they were legitimate, for they paid them each one-fifth of the fund. The objection is ingenious, but I do not feel that there is any real doubt upon the fact, and if there had been any doubt the executors would have acted differently. Therefore, I do not think that any inquiry as to the legitimacy of the plaintiffs is required; but it does seem to me that it would be right to have an inquiry whether the son of W.

Buckle survived the testator, and when he died. As regards the construction of the will, it appears to me, that the main part of the 10,000*l.* which had not become due, so as to be payable to W. Buckle, is given bodily to the children. The direction in the will is, that the money shall be laid out at interest for the benefit of the children, until they shall attain twenty-one, and then the principal to be divided amongst them, share and share alike. It appears to me, that on the true construction of this bequest the 8,500*l.* ought to have been laid out at interest upon the death of W. Buckle, and accounted for accordingly, and that each of the children was entitled to a share of that sum, upon attaining twenty-one years of age.

V.C. March 20. } TAWNEY *v.* THE LYNN AND ELY RAILWAY COMPANY.

Railway Company—Notice to take Land, binding.

A railway company having given the plaintiff notice that they should require twenty perches of his land, subsequently gave a notice that they should only require one perch, and also gave a notice withdrawing the former notice:—Held, that the first notice was binding; and that, without the consent of the plaintiff, another valid notice could not have been given.

This was a motion on behalf of the plaintiff, for an injunction to restrain the defendants, the Lynn and Ely Railway Company, their servants, workmen, and agents, from taking any proceedings to ascertain the nature of, and from entering upon any part of certain pieces or parcels of land situate in the parish of Littleport, in the Isle of Ely, and county of Cambridge, mentioned and referred to in the plaintiff's bill, and in the plans deposited with the clerk of the peace, in pursuance of two notices, bearing date respectively the 24th of December 1846, served on the said plaintiff. It appeared by the bill, and the affidavit of the plaintiff in support of the motion, that the railway company had served notices upon the plaintiff, in pursuance of their act, in March 1846, stating that they would require certain lands specified therein. After some correspondence bet the parties these notices were waiv both sides, and other notices were s by the company on the 16th of Dec 1846, in which a portion only of the comprised in the first notices were spe and in such notices it was stated that t perches of a piece of land numbere would be required for the purposes railway. Shortly afterwards, the defen having ascertained the exact quant the piece of land numbered 122 whic were advised would be required, notices, dated the 24th of December were served on the plaintiff, which similar to those of the 16th, with th ception that the latter notices com only one perch, instead of twenty pe of No. 122. At the same time a was served, withdrawing the previou tices.

Mr. Bethell and *Mr. E. F. Smi* support of the motion, contended th railway company had no power to alt a variety of notices, the quantity o they intended to take, and that w notice was once given, it amounted contract, the specific performance of the plaintiff had a right to enforce. case of *Stone* v. *the Commercial Ra Company* (1) was cited.

Mr. Stuart and *Mr. Malins*, fo defendants, contended that the co might give as many notices as they pl and the last would supersede all the provided the former notices should been withdrawn.

The Vice Chancellor.—When th of *The Manchester and Leeds Railway pany* came before the present Lord Ch lor, he entered fully into the circumst though it was manifest the thing scarce mitted of any doubt. He said, that w the subject was of great or small valu not the question; but the question whether this company was lawfully p ing the right given to them by the parliament. My notion is, that the point to be considered is, whether the pany, who had no right to take any p of the land without complying with the of the notice, were authorized to do

(1) 1 Rail. Cases, 375.

they have done. It is obvious that unless the strictest hand is kept, the acts of parliament might be turned into instruments of tyranny, and persons might be totally disabled from dealing with their property as their own: and it is the duty of the Court to protect individuals in a manner which cannot be done by having recourse to a court of law; but this Court must judge whether what the company intends to do is, in the consideration of the Court, justified by the act.

Now I do not think it is necessary to enter into the question of the 85th section of the Lannds Clauses Consolidation Act (2). [His Honour then commented upon the mode of appointing surveyors under the act, and then continued:] My intention is to decide upon this point, which is clear in my mind. The notice was given in the first place, and I can understand if the notice was given, and it was treated by both as a nullity, the company might have given a new notice. It appears that here the plaintiff disregarded the first notice, and the company did so too: then the company gave a new notice on the 16th of December, but nothing was done upon it, and then they gave the notice of the 24th of December; and it is plain that notice differed from the notice of the 16th in a very small degree, but still that there was a substantial variation. They also gave up the notice of the 16th of December; but it appears to me that they had no power to give up that notice: the consequence of such a course would be, that from month to month the company, acting under the influence of this principle, might choose to vary their plans, and give varying notices, so that the owner of the land could never know what to do with his property. My opinion is, that it is not competent, under the latter notices, for the company to enter under the Lands Clauses Act, and to do as they have done. The notice that binds is that of the 16th of December; the first, in fact, being treated as a nullity, and without the consent of the person upon whom it is served another valid notice could not be given.

(2) 8 Vict. c. 18.

V.C.
March 23, 27. } HEATH *v.* UNWIN.

Injunction—Second Trial at Law.

The plaintiff, having obtained a patent for an improved method of making steel by the application of carburet of manganese, brought an action against the defendant for infringing his patent by using two ingredients, which, when fused, would produce carburet of manganese. The Court of Exchequer held that the patent had not been infringed, either directly or indirectly, because the defendant was ignorant of the fact that he was using the same substance as that employed by the plaintiff. A motion for an injunction upon a bill filed prior to the action was now opposed, on the ground that the decision of the court of law was final, and the bill ought to be dismissed. The Court considered that although the act was committed unconsciously, the defendant was liable for the injury he had done, and consequently retained the bill, and gave liberty to the plaintiff to bring another action.

The plaintiff had obtained a patent in the year 1839, for certain improvements in the manufacture of iron and steel, and by his specification he claimed, amongst other things, the use of carburet of manganese in any process, for the manufacture of cast steel, and described the process thus:—"I propose to make an improved quality of cast steel, by introducing into a crucible bars of common blistered steel, broken as usually, into fragments, or a mixture of cast and malleable iron or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, &c., but I do not claim the use of any such mixture as any part of my invention, but only the use of carburet of manganese in any process for the conversion of iron into cast steel." In January 1844, the plaintiff brought an action against the defendant for an infringement of this patent, when it appeared that the defendant's method of making steel was as follows:—He placed blistered steel in a crucible, together with certain proportions of black oxide of manganese and carbon, and by the evidence of the scientific witnesses it was proved that

these substances would become fused at a certain heat, and would combine and form the carburet of manganese before the blistered steel, which would require a much greater heat to fuse it, could be operated upon by them. Upon this trial at law the jury found a verdict for the plaintiff on all the several issues; but leave was given to the defendant to move to enter a verdict, on the plea of not guilty, first, that the defendant had not used the actual substance called carburet of manganese in the manner described in the specification; and, secondly, that the use of the simple elements forming the components of carburet of manganese was not an infringement of the plaintiff's patent.

A rule having been obtained accordingly, the case came on again in the Exchequer (see 13 *Mee. & Wels.* 583, and 14 *Law J. Rep.* (N.S.) Exch. 153); and on the 11th of January 1845, the Court held that the defendant had not been guilty of an infringement of the plaintiff's patent. The conclusion of the judgment of the Court was to this effect:—"The patent is obtained for the use of one peculiar combination of carbon and manganese, the metallic substance called carburet of manganese, and for the use of it in that state. The specification is expressly for the employment of carburet of manganese, and the mode of using it is by putting a certain quantity by weight of that substance, in an unmelted state, into the crucible. This being, in our opinion, the true construction of the specification, it is clear that the defendant has not directly infringed the patent by imitating and using the same process substantially. Now, there is no doubt, we think, if a defendant substitute for a part of a plaintiff's invention some well-known equivalent, whether chemical or mechanical, it would probably be considered as only a colourable variation: but here he has not done so. It is quite clear upon the evidence, that the defendant never meant to use the carburet of manganese at all; he certainly never knew, and there is no reason to suppose that prior to this investigation any one else knew, that the substance would be formed in a state of fusion; and it is mere matter of speculative opinion, though after the verdict we must assume it to be a correct opinion, amongst men of science that it would; but it was clearly not ascertained, and still less was it a well-known fact. There was, therefore, no intention to imitate the patented invention, and we do not think the defendant can be considered to be guilty of any indirect infringement if he did not intend to imitate at all. In this view of the case it becomes unnecessary to consider the other questions which were argued, and we all think that the rule must be absolute to enter a verdict on the first issue for the defendant."

This bill was filed on the 29th of August 1844; but the motion for the injunction was not made until the 27th of March last.

Mr. Bethell and *Mr. Chichester* appeared in support of the motion, and contended that the decision of the court of law was contrary to the opinion expressed by the Lord Chancellor, in several cases. The patent was fully established, but the Judge had, in fact, decided that the defendant had not directly infringed the plaintiff's patent, because he had never used the substance called carburet of manganese in the mode described in the specification; and that he had not indirectly infringed the patent, because he did not know that the ingredients he had used would produce the same effect as the single ingredient used by the plaintiff.

Mr. Walker and *Mr. Rolt* appeared for the defendant, and contended that the judgment of the court of law was conclusive, and the bill ought now to be dismissed.

The VICE CHANCELLOR.—This case appears to me to come on under very novel circumstances. I do not recollect a similar application having been made, unless the case of *Kay* v. *Marshall* (1) can be considered as a precedent. It strikes me that what has been stated as the opinion of the Judges of the Court of Exchequer, when the case was before them, is fraught with very dangerous consequences to the rights of persons, because though I can understand that the *animus* with which an act is done is of importance to be considered when the question is dependent upon the quality of the act, as regards a criminal proceeding, for then it might be an answer to say that the act was done without the intention of

(1) 1 M. & Cr. 373; s. c. 4 Law J. Rep. (N.S.) Chanc. 258.

the party; still, when the matter is in the nature of a civil right, I cannot see that it is any answer to state that the act was not within the intention of the party. It appears to me when a party has done any act without meaning to produce an injury, still *primâ facie* he is liable for the injury he has done. In the recent case of *Stevens* v. *Keating*, respecting the use of borax, the Lord Chancellor expressed an opinion that he would not follow the rule laid down by the Judges of the Court of Exchequer. Upon an application for an injunction, in a case like this, it is necessary to consider the balance of justice. If I make no order the consequence will be that the order must be dismissed, and whatever may be the rights of the parties, the plaintiff would be obliged to recommence his suit so as to have the question tried again; and it appears to me that very little injury will be done in retaining the bill. Therefore, under all the circumstances, and having regard to the opinion of the Lord Chancellor, I think it is better to retain the bill upon the file, and to give the plaintiff liberty to bring such action as he may be advised, either in the Court of Exchequer or the Court of Common Pleas.

K. BRUCE, V.C. March 26. } HILTON *v.* GIRAUD.

Mortmain Act—Charitable Uses.

Shares in the London Dock Company and the West India Dock Company are not within the stat. 9 *Geo.* 2. *c.* 36. *s.* 3.

Henry Wright, by his will, dated the 11th of December 1838, gave the residue of his estate to trustees for certain charitable purposes. The testator died in 1840. Part of the testator's residuary estate consisted of shares in the London Dock Company and the West India Dock Company. The suit was instituted for the administration of the estate of the testator.

One of the questions in the suit was, whether these London Dock and West India Dock shares were within the 9 Geo. 2. c. 36. s. 3, which enacted that gifts of "lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments," to or in trust for charitable uses, should be void.

By the 9 Geo. 4. c. cxvi. (the London Dock Company's Consolidation Act) s. 9, it was enacted, that after the passing of the act, the docks, basins, wharfs, quays, warehouses, erections, buildings, land, ground, tenements, and hereditaments, and all real and personal property whatsoever of the London Dock Company should be vested in the London Dock Company; to hold to them, their successors and assigns, for such and the same estates, terms, and other interests as were then existing therein respectively, and for the purposes of the act.

By the 10th section it was enacted, that the capital of the said company should be vested in the said company and their successors, for the purposes of the act, for the use and benefit of the proprietors of the said capital in the proportions to which they should be entitled thereto; and all the said capital stock should be deemed to be personal estate, and pass by transfer, &c.; and should be transmissible by will as such; and, in case of no will, should be distributable as intestate's personal estate.

The 11th and 12th sections of the 1 & 2 Will. 4. c. lii. (the West India Dock Company's Consolidation Act) are (with the exception of the clause as to transmission of the capital stock by will or in case of no will) the same as the 9th and 10th sections of the 9 Geo. 4. c. cxvi.

Mr. Koe, Mr. Crawford, Mr. Wigram, Mr. Piggott, Mr. Simpkinson, Mr. Faber, Mr. Kenyon Parker, Mr. Greene, and *Mr. Wray*, for the different parties.

The following cases were cited:—

Negus v. *Coulter*, Amb. 367.
Finch v. *Squire*, 10 Ves. 41.
Thompson v. *Thompson*, 1 Coll. 381; s.c. 13 Law J. Rep. (N.S.) Chanc. 455.
Sparling v. *Parker*, *ante*, 57.

KNIGHT BRUCE, V.C. said that he thought that the shares in question were not to be considered as coming within the words "lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting any lands, tenements, or hereditaments;" and that the charities were entitled to the shares.

M.R. June 3. } SPRYE *v.* REYNELL.*

The 114*th of General Orders of* 1845—*Dismissal of Bill.*

The words "last of the answers" in the 114*th Order of May* 1845, *mean the last answer of the defendant who moves to dismiss.*

Mr. Shapter moved, on behalf of the defendant Reynell, to dismiss the plaintiff's bill for want of prosecution, pursuant to the 114th Order of May 1845 (1). Four weeks from the sufficiency of Reynell's answer expired on the 25th of May. The plaintiff had not filed replication or set down the cause on bill and answer. It was urged that the decision of the Lord Chancellor in *Arnold* v. *Arnold* (2) did not interfere with the decision in *Dalton* v. *Hayter* (3); it merely affirmed *Foreman* v. *Gray* (4). The only other defendant was a mere nominal defendant, a trustee named by the plaintiff, who had not appeared when the notice of motion was served, but has since put in his answer.

Mr. Kindersley, for the plaintiff.—This is a cross cause. The original bill was filed the 3rd of April, and amended the 4th of March 1846. The cross bill was filed the 28th of August 1846. The answer of the defendant Reynell was filed on the 25th of February 1847. Owing to the intervening vacation the four weeks after the sufficiency of answer expired on the 25th of May, and on the 28th notice of this motion was served. The pleadings are extraordinarily long and complicated, and the plaintiff's bill is now before counsel to amend, who requires a week to complete the amendments. It is generally understood that the Chancellor's decision in *Arnold* v. *Arnold* differs from the judgment in *Dalton* v. *Hayter*.

The MASTER OF THE ROLLS.—*Arnold* *Arnold* (5) in no way differs from *Dal* v. *Hayter*. The plaintiff is clearly right his motion. But it does not necessar follow that I shall dismiss the bill. I w give the plaintiff till the first seal after te to enable him to amend. This motion stand over till then.

L.C. Jan. 28, 29. } MORRIS *v.* MORRIS.

Bill to perpetuate Testimony—Publi tion of Depositions.

Where a party filed a bill in this cou to perpetuate testimony, which was to used in the Court of Chancery in Irel and the question in the suit there was for decision, the Court here ordered pu cation of the depositions, leaving the C in Ireland to decide whether they wer were not admissible.

This bill was filed in 1823, to perpet testimony. The litigation related to s estates in Ireland, and the validity of claim set up to these estates by the diffe parties depended upon the question whe the marriage of the father of J. W. Mo one of the claimants, which was stated have taken place in 1812, was or was n void. The father of J. W. Morris w tenant for life in remainder expectant upo the death of his father George Morris, wh died in 1843. The validity of the marriag of J. W. Morris's father was impeached upon the ground that a previous marriage had been entered into by his mother, and that her former husband was still living at the time of the celebration of the marriage in 1812. The bill was filed by the parties who would be entitled in case J. W. Morris's father died without issue, to perpetuate the testimony of witnesses who were stated to be able to prove the fact that the first husband was then living.

A similar bill had been filed in Ireland in 1816.

* This case was decided in Trinity term, but is reported early on account of some doubt having existed as to the effect of it.

(1) Ord. Can. 330; 14 Law J. Rep. (N.S.) Chanc. 295.

(2) 9 Beav. 206; s. c. *ante*, p. 236.

(3) 7 Beav. 586; s. c. 15 Law J. Rep. (N.S.) Chanc. 33.

(4) 9 Beav. 200; s. c. *ante*, p. 233.

(5) *Vide* General Order of the Court dated the 13th of April 1847, by which it is directed that no order of course for leave to amend shall be obtained after notice of motion to dismiss the bill for want of prosecution.

In 1845 J. W. Morris filed a bill in the Court of Chancery in Ireland to establish his claim to these estates.

A motion was made on behalf of the plaintiffs that certain depositions taken in this cause in the year 1847 might be forthwith published, or that the depositions of the several witnesses might be published on the production to the proper officer of this honourable court of an affidavit that publication had passed of the depositions taken in a cause depending and at issue in the Court of Chancery in Ireland.

In July a similar application was made to the Court of Chancery in Ireland, but the motion was directed to stand over until witnesses had been examined in the suit brought by the son.

The Vice Chancellor Knight Bruce had made an order in accordance with the notice of motion.

A motion was now made on behalf of J. W. Morris, that the order of the Vice Chancellor might be discharged.

Mr. Rogers, in support of the application, contended, that there was no authority for an order directing the publication of depositions intended to be used in the Court of Chancery in Ireland, which must be considered as a foreign court.

The following authorities were referred to:—

Boden v. *Dellow*, 1 Atk. 289.
Bent v. *Young*, 9 Sim. 180; s. c. 7 Law J. Rep. (N.S.) Chanc. 151.
The Attorney General v. *Ray*, 2 Hare, 518.
Cawston v. *Helwyes*, Rep. temp. Finch, 218.
The Earl of Abergavenny v. *Powell*, 1 Mer. 434.
Foulds v. *Midgley*, 1 Ves. & B. 138.
Douglas v. *Brown*, 2 Dow & Cl. 171.
Houlditch v. *the Marquis of Donegal*, 8 Bli. 301.
Salt v. *Donegall*, 1 Ll. & G. 82.
Morrison v. *Arnold*, 19 Ves. 670.
Harris v. *Cotterell*, 3 Mer. 678.
Barnsdale v. *Lowe*, 2 Russ. & Myl. 142.
Kelsall v. *Kelsall*, 2 Myl. & K. 409.
Price v. *Carver*, 3 Myl. & Cr. 157.
Lord Dursley v. *Fitzhardinge Berkeley*, 6 Ves. 251.
Tulloch v. *Hartley*, 1 You. & Coll. C.C. 114.
Bayley v. *Edwards*, 3 Swanst. 703.

The Lord Chancellor said, that the expectancy as to these estates had fallen into possession, and the witnesses were dead, and the situation of the parties was such that the depositions taken in this suit were to be used now, if they could be used at any time. Whether the Court of Chancery in Ireland would allow them to be used was a question which that Court would have to decide. But as the case made by the bill in this country was now complete, he thought the decision of the Vice Chancellor was right in ordering publication of the depositions to pass, and this motion must, therefore, be refused with costs.

Wigram, V.C. Feb. 9. } HEMING *v.* SWINNERTON.

Arbitration—Rule of Court—Lapse of Time.

A submission to arbitration may be made a rule of court after the award has been made, and notwithstanding the expiration of the time allowed by the second section of 9 & 10 Will. 3. c. 15. to either party to take objections to the award, on the ground of corruption and undue means.

The plaintiff and defendant had entered into an agreement, out of court, to refer all matters in difference between them in that suit to arbitration; and it was one of the terms of the agreement that the reference, and the award to be made in pursuance of it, might, at the instigation of either party, be made an order of this court. The award having been delivered out on the 22nd of March 1845, notice of motion was given on behalf of the defendant that the submission and award might be made a rule of court.

Mr. J. Parker and *Mr. Metcalfe*, for the motion, now applied that the submission alone might be made a rule of court; and they cited *Heming* v. *Swinnerton*(1), and *Wilkinson* v. *Page*(2).

(1) 2 Phil. 79; s. c. *ante*, p. 90.
(2) 1 Hare, 280; s. c. 11 Law J. Rep. (N.S.) Chanc. 193.

Mr. Rolt and *Mr. Wright*, for the plaintiff, contrà, contended that the application was too late; that if the award were now made a rule of court, the plaintiff would be absolutely shut out from impeaching it on any ground whatsoever. By the 2nd section of the 9 & 10 Will. 3. c. 15, the party must make his complaint at the latest before the last day of the next term after such arbitration or umpirage made and published to the parties. The plaintiff, therefore, by the delay of the defendant, is absolutely precluded from questioning the award. The party seeking to enforce the award must apply to the Court before the time allowed by the statute to the other party for questioning the award has expired. Secondly, that it was a good answer to the motion that the award was vicious.

Mr. J. Parker, in reply.—The plaintiff himself might have moved to have made the submission a rule of court; and upon that have impeached the award. The submission may be made a rule of court after the award is made—*Fetherstone* v. *Cooper* (3), *Smith* v. *Symes*(4). No such qualification of the rule as that contended for by the plaintiff is stated in the books. Any objection appearing on the face of the award may be urged by the plaintiff, when the Court is called upon to enforce the award.

WIGRAM, V.C.—The question originally raised upon the construction of the statute was, whether the submission could be made a rule of court after the award had been made, and this, it was absolutely held, might be done. There is nothing upon this statute which, after this construction, limits the time at which the submission may be made a rule of court. It is, however, contended by the plaintiff, that this can only be done within the period allowed by the 2nd section of the statute for objecting to the award on the ground of corruption. If it is intended to resist the award on these grounds, it is in the power of either party to have the submission made a rule of court, and then to make this complaint within the time limited by the act. There is no inconsistency in a party taking this step for the purpose of enabling him to impeach the award; for it is the submission, and award itself, which is made a rule of and the party thereby only affirms has given an authority to the arb which he has abused. I am of o therefore, that the time which has is no bar to the order being made. no reason for a difference of practice subject in courts of equity and courts All the objections which the plaintif now raise from the award itself, will b to him when the other party takes s carry the award into effect. The must be confined to making the subi only a rule of court.

(3) 9 Ves. 67.
(4) 5 Mad. 74.

M.R.
Jan. 25, 27; April 13, 14. } *In re* HARDING.

Taxation—Solicitor's Bill—Pres Errors—Overcharge—Payment—I —Costs.

Payment of a bill is, primâ facie, *mission of its correctness; and, afte ment, special circumstances must be to entitle a party to an order for taxa the bill. The special circumstances relied on are, first, when pressure h exercised by the solicitor, and immedia ment required, where delay in complet business would be inconvenient to th paying; and, secondly, error or overch the bill. Errors or overcharges may b as of themselves amount to evidence of in which case only very slight circum of pressure are necessary, if necessary A petition, seeking taxation of a bill o after payment, must point out and p larize items of overcharge.*

A client may pay his solicitor a costs, without ever having seen or ha vered to him any bill; but such a would be bad conduct in the solicito imprudent in the client. In the prese the imperfect state of the evidence have induced the Court to dismiss th tion without costs; but the petition con an unfounded charge of fraud, it w missed with costs.

This was a petition, presented on tl of December 1846, by George Wo

trustee recently appointed of certain estates comprised in a marriage settlement, seeking the taxation of two bills of costs of William Harding, which had been paid by Woods. The petitioner by a deed, dated the 1st of December 1845, and executed by him on the following day, had been appointed a trustee in the room of E. Astbury, who died in September 1844, and who, previously to his decease, had employed Harding as his solicitor, in and about the matters of the trust. Harding, on the instructions of Astbury, had endeavoured, previously to his decease, to make sale of the trust estate, under a power of sale contained in the settlement; and, in the meanwhile, and before Woods executed the deed constituting him a trustee in the room of Astbury, Harding contracted with Mr. Copeland to sell the trust estate to him. On the 2nd of December 1845 Woods executed a conveyance of the trust estate to Mr. Copeland. Woods, on that occasion, acted under the advice of Harding, and he received a large sum, being the price agreed upon as the purchase-money, and thereout, on the application of Harding, Woods on the 3rd of December paid to Harding two several sums of 466*l.* 9*s.* 8*d.* and 526*l.* 11*s.* 3*d.*, the former sum represented as Harding's demand against the trust estate, and the latter his demand in respect of general business transacted by Harding, against Mr. Tait, the husband of Mrs. Tait, who were both parties to the settlement and interested therein. Harding thereupon gave Woods two written receipts for those two sums, with two general accounts annexed thereto. The petition in a general manner complained of many of the items in the bills of costs, as being extravagant, improper, and unreasonable, and set forth divers specimens of the improper mode in which the bills of costs were made out. It also appeared that by far the greater part of the bill of costs against the trust estate consisted of business transacted by Harding during the interval between the death of the old trustee (Astbury) and the appointment of the petitioner the new trustee. The petition alleged that the bills of costs of Harding were not delivered to Woods until the month of January 1846, and that Harding, acting as Woods's solicitor, ought not to have required or permitted Woods to apply the trust funds in payment of the bill against the trust estate, without any examination thereof by Woods, and without any knowledge or means of information on his part on the subject; that the bill against Tait was, to a considerable extent, made up of charges for useless and unnecessary journies, altogether amounting to 160*l.*, and that, in the bill against the trust estate the charges for journeys alone amounted to 100*l.* and upwards, the greater part whereof was wholly improper. The petitioner in his affidavit stated that the bills of costs, amounting to the sums already mentioned, were sent to him by Harding, in the month of January 1846, accompanied by a letter, dated the 31st of December 1845, whereas Harding stated that he delivered the same to Woods on the 2nd of December, at the hotel at Burslem, where all the parties were assembled on business, and immediately after the execution by Woods of the conveyance to Copeland; and that he explained to Woods (who paid the bills voluntarily and of his own accord) the nature thereof, and in respect of what business in particular the said several bills of costs were incurred. Much conflicting evidence was adduced relative to the time of the delivery of the bills of costs, *i. e.* whether they were delivered to Woods on the 2nd of December 1845, or in the following month of January. Harding, in his affidavit, also insisted that the charges contained in the bills of costs, were reasonable and proper, and the journeys and attendances objected to in the petition were necessary, and that the whole of the items charged in the several bills of costs were reasonable and proper, and did not exceed the usual rate of charges made by attornies and solicitors. The petition contained charges of fraudulent conduct on the part of the respondent.

Mr. W. M. James, in support of the petition, contended, that the form of the bills indicated clearly that they were intended to be made against Mr. Tait, and not the trustee; that as there had been no trustee in existence during a part of the time, when a great portion of the business was transacted, it was the duty of Harding at least to explain the bill of costs to the new trustee, before he required payment thereof; that the transactions on the 3rd of December were irreconcileable with the

circumstance of the bills of costs having been delivered by Harding to Woods on the 2nd of December, and that the payment of the bills of costs, having been made by a party, who, at the time, had no legal adviser except the very party who insisted on payment of them, ought to entitle the petitioner to an order for taxation, especially where the bills were not delivered (as was the fair inference to be drawn from the evidence before the Court) until many days after their payment.

Mr. Turner and *Mr. W. T. S. Daniel*, contrà, contended, that the bills of costs were delivered to Woods on the 2nd of December 1845, and with reference to the bills relating to the trust affairs, that Woods, the new trustee, having adopted the proceedings taken by Harding previously to Woods becoming such new trustee, could not afterwards be permitted to repudiate the same; that the general allegation in the petition, that the greater part of the charges made by Harding were improper, was not sufficient according to a series of decisions of the Court to entitle the petitioner to an order to tax the bills; that after payment of a bill of costs the onus was placed on the client to shew the unreasonableness of the charges contained in the bill; and in the present case, no one objectionable charge in particular in either of the bills, was specified by the petition; that as to the other bill of costs, which had reference exclusively to business done by Harding for Tait, it was paid by Woods on Tait's behalf, and Tait made no complaint in respect of it.

The Master of the Rolls, after observing how much time cases of taxation occupied, which might be much better employed, and how unpleasant a spirit they engendered between the solicitors concerned in them, proceeded as follows:—After payment of a bill of costs it is important to bear in mind that "special circumstances" must be adduced, and that the *onus probandi* lies on the party who has paid the bill, and afterwards seeks taxation. *Primâ facie*, the payment of a bill is an admission of its correctness by the party paying it. The special circumstances which are usually relied on are of two kinds; first, when pressure has been exercised, and an immediate payment required by the solicitor, at a time when it would be very inconvenient to th paying the bill that any delay shoul in the completion of the business secondly, error or overcharge in th Errors or overcharges may be suc themselves amount to evidence of and then only very slight circumsts pressure are necessary, if indeed ne at all, where there is evidence of fi induce the Court to direct a taxatic payment. In the present case, the circumstances are very slightly stat have not been much insisted on. S the case depends on pressure, it the party who paid the bills in q was not at home, and from his engag it might be very inconvenient to hir it appears he was absent two or thr at the least; and I find that intervie place between the parties on the 1 and 3rd of December. I cannot thi there is anything of the nature of p in this circumstance which would make it right, after payment, to taxation of the bills. Now what circumstances of another kind? Tl no special items pointed out as beir as ought not to be charged, or so g would be evidence of fraud; that is case now made; but it is stated in th there were two bills of costs, one o related to the trust estate, and the the private business of Mr. Tait. had been a trustee of Mr. Tait's n settlement, with a power of sale, a power of sale he had determined to e and he had given instructions to H his solicitor, to proceed to sell, by auction, before he attempted any private contract; and in this state o Astbury died, and then, no doubt, A retainer of Harding ceased, and wher ing went on acting in the trust b he was acting as the solicitor of no c at his own risk, in the same way as citor who takes on himself to file without specific authority from his There were other persons interested trust fund, viz., Mr. Tait, to the e 3,000*l.*, and Mr. Tait and his fa to the rest, who might reasonably rections to the solicitor which the would be likely to sanction. Hardi on acting in the business, incurred e to a considerable amount, entered

contract for sale, and it was not until the contract was ready for execution that it was thought necessary by him to have a new trustee appointed. There was not one step taken by Harding which might not be disavowed, and, in such a case, he would have had to shew that everything he had done was for the benefit of the trust estate, and the parties interested in it. When it became necessary to have a trustee appointed, some communication was had with Mr. Woods, the petitioner, who afterwards married Tait's daughter. What passed on that occasion was such as to induce Mr. Woods to accept the office of trustee. It is not pretended that he came to the meeting of December 1845 an entire stranger to what was expected from him, nor can I suppose Woods was in a state of ignorance of all that had taken place before the death of Astbury. He could hardly have been so, or have proceeded in the arrangements without communicating with the *cestuis que trust*. Suppose Woods had paid all these expenses, without any bill of costs having been drawn out, it was in his power to do so, but it would have been a very foolish course to pursue. A man may pay his solicitor blindfolded, if he pleases, but such would not be a prudent proceeding on his part, and would, certainly, be bad conduct on the part of the solicitor: that act of itself, however, would not be unlawful, and would not entitle the client to a taxation after payment, but it would be sufficient if he had specified items of overcharge, which indicated fraud. Then comes the principal question. It is alleged by Harding, and proved by his clerk, that the bills of costs were in fact prepared and ready for delivery on the morning of the 2nd of December; it is sworn that the bills of costs were on the table at which Harding sat, in the room of the hotel, and that Woods was seen examining them, or part of them, on the same day. On the other hand, Woods positively swears that the bills of costs were not delivered to him. I do not say that the subsequent statement, viz., that the "accounts," not the "bill of costs," were not delivered to Woods, was an equivocation, the bills of costs and accounts being so mixed up and entangled with each other. The transaction thus rests in a state of ambiguity as to the degree of credit which ought to be given to the affidavits, or to the understanding of the parties at the time.—Here his Lordship, after making observations with reference to the letter, from Woods to Harding, of the 8th of December 1845, the answer thereto of the 18th of December, and the letter of Woods to Harding of the 24th of that month, wherein it was stated by Woods that the *particulars* of the accounts had not been delivered to him, said, that the evidence as to the date of the delivery of the bills of costs was very imperfect; he could collect nothing very precise from the correspondence that occurred in December 1845, but he did not consider that the petition had been successful on that point. No proof, however, was adduced by the petitioner that the business in question had not been transacted, or of the existence of overcharges; and his Lordship did not think the circumstances of the case were such as ought to induce him to direct the two bills to be taxed; and the only question that remained to be disposed of was that relating to the costs of the petition. The imperfect state of the evidence adduced would rather have induced his Lordship to dismiss the petition without costs; but finding an imputation of an improper kind made against the solicitor, viz., that of fraud, the petition must be dismissed with costs, notwithstanding the affidavits principally related to the other matters contained in the petition.

K. Bruce, V.C.
1846.
July 30.
L.C.
1847.
March 5.

CHAMBERS *v.* SMITH.

Administration Suit—Costs—Executors' Costs of improperly defending Action.

Costs incurred by executors in unsuccessfully defending an action brought by the surgeon, who had attended the testator up to his death, were, under the circumstances, not allowed to the executors; but the plaintiffs having gone into evidence as to the reasonableness of the surgeon's bill, instead of leaving it for inquiry before the Master, the additional costs occasioned thereby were not to be borne by the executors.

Where in a suit against executors expenses

are incurred by going into evidence upon particular items, which are proper subjects for inquiry before the Master, those expenses will be borne by the plaintiffs.

This bill was filed by the parties who were beneficially interested under the will of Benjamin Chambers against his executors. The testator died in August 1841. A surgeon who had attended him sent a bill to the executors, amounting to 75*l.* 16*s.* The executors considered this to be an exorbitant claim and refused to pay it. The surgeon then commenced an action against the executors, who paid a sum of 52*l.* 6*s.* into court. The action was tried, in March 1843, and the surgeon obtained a verdict for 18*l.* 10*s.*, making, with the money paid into court, the sum of 70*l.* 16*s.*, being only 5*l.* less than his original demand. The surgeon's taxed costs in the action were also paid by the executors, amounting to 130*l.*, and the costs of the executors, in defending it, were nearly 100*l.* In February 1843 the three children of the testator, who were the only adult plaintiffs, served a notice upon the executors, requiring them not to defend the action, and stating that, in their opinion, the claim of the surgeon was a proper one and ought to be paid. Their attorney had also advised them not to defend the action. The will gave authority to the executors, at their discretion, to settle any accounts and wind up the testator's affairs; and in so doing to make such arrangements relative to debts due or claimed to be due to or from his estate, as they should judge expedient. The bill prayed for the usual accounts of the testator's estate, and also prayed that in taking the accounts the 130*l.*, paid for the costs of the action, and also the executors' costs in defending the action, might not be allowed. Evidence had been gone into on both sides, as to the propriety of the surgeon's bill.

Mr. Rolt and *Mr. J. D. Chambers*, for the plaintiffs, contended that where there was so small an amount in dispute, the executors, after paying 52*l.* into court, were not justified in defending an action for the sake of avoiding payment of the rest of the bill. It was perfectly clear that their proceedings must, in any case, subject the testator's estate to greater expense. The executors had full authority under the will to pay the whole of the demand, if they [illegible]ad thought proper.

They cited—

Morgan v. *Hallen*, 8 Ad. & El. 4[illegible]9; s. c. 7 Law J. Rep. (N.S.) Q.B. 2[illegible]2.
Buxton v. *Buxton*, 1 Myl. & Cr. 80[illegible]
Garrett v. *Noble*, 6 Sim. 504; [illegible]c. 3 Law J. Rep. (N.S.) Chanc. 159[illegible]
The Attorney General v. *Pearson*[illegible] 2 Coll. 581.
Caffrey v. *Darby*, 6 Ves. 488.
Penfold v. *Bouch*, 4 Hare, 271.
Ellis v. *Ellis*, 1 Russ. 368.
Massey v. *Banner*, 1 Jac. & Walk. 2[illegible]41.
Packwood v. *Maddison*, 1 Sim. & [illegible]tu. 232; s. c. 1 Law J. Rep. Chanc. [illegible]07.
Campbell v. *Campbell*, 2 Myl. & Cr[illegible]25.
Handey v. *Henson*, 4 Car. & Pay. [illegible]10.
Kannen v. *M'Mullen*, Peake's N.P.C [illegible]59.

Mr. Russell and *Mr. Hargrave*, for the defendants, contended that the execu[illegible]ors took the best means they could to ascert[illegible]in whether the charges in the surgeon's [illegible]ill were or were not proper. They were [illegible]in-formed that the charges were excessive, a[illegible]nd they were therefore bound not to pay the[illegible]n.

July 30.—Knight Bruce, V.C.—Sin[illegible] this cause was argued I have read atte[illegible]tively the pleadings and depositions. Th[illegible] result has been the confirmation of th[illegible] opinion with which, at the close of the de[illegible]fendants' case, I was impressed. It appear[illegible]ed then, and still appears to me, that th[illegible] executors' conduct in not preventing th[illegible] surgeon's action from being brought, by [illegible] paying him, if necessary for the purpose, [illegible] his whole demand, and in defending th[illegible] action as they did, was so manifestly and [illegible] so grossly imprudent as to be inexcusable, [illegible] and to render it impossible to allow them [illegible] the costs paid to the plaintiff at law, o[illegible] their own costs and expenses in respect o[illegible] the action. The circumstance that the jury [illegible] gave 5*l.* less than the amount of the bill [illegible] delivered is, in my judgment, immaterial, [illegible] except as it enables the Court to allow to [illegible] the executors that sum, of which, at an [illegible] expense, as they say, of more than 200*l.*, they succeeded in depriving him. They may be allowed the 5*l.*, as if they had paid him his full demand. The decree will declare that in respect of Mr. Tucker's demand of 75*l.* 16*s.*, the defendants are to be allowed the full amount thereof, but not any

costs, charges, or expenses, on either side, in respect of the action; and if the executors shall claim to be allowed any other costs, charges, or expenses, in respect of such demand, the Master, in considering such claim, is to have regard to the question how far they were reasonably and properly incurred, and the defendants are not to be allowed any costs of this suit, to this time, so far as the suit relates to the said demand of 75*l.* 16*s.*, or to the said action, and are to pay to the plaintiffs the costs of this suit, to this time, so far as such costs have been increased by evidence upon either of those two subjects; but let the taxation of such costs be reserved. Reserve all other costs.

The executors appealed from this decision, and insisted that, at all events, the costs occasioned by the evidence respecting the surgeon's bill ought not to be thrown upon the executors.

Mr. J. Russell and *Mr. Hargrave* appeared for the appellants; and

Mr. Rolt and *Mr. J. D. Chambers*, in support of the decree.

March 5, 1847.—The Lord Chancellor said it was a very unfortunate case, and it was to be regretted that the executors did not follow the recommendation of their solicitor, and pay the surgeon's bill, particularly after all the adult *cestuis que trust* had requested that this course might be adopted. It was stated, that several of the charges in the surgeon's bill were exorbitant, and that it was not customary in that neighbourhood for medical practitioners to charge for visits. Where no special agreement was made with a medical man respecting his charges, he would be entitled to charge according to the ordinary course of practice in that place. The defending of an action, even successfully, was almost always attended with some expense; and before executors refused payment of a claim which they thought exorbitant, they should consider, that even if they succeeded in defending an action, they would incur extra costs, which the opposite party could not be called upon to pay to them. In this case the sum in dispute was so small, about 23*l.*, that the extra costs would almost certainly exceed it; and there was also the chance of not succeeding. Under all these circumstances, and considering the advice of the solicitor, and the intimation from the *cestuis que trust*, it was injudicious in them to allow the action to go on. The verdict was for 70*l.* 16*s.* As that sum had been paid by the defendants, it must be allowed them in their accounts, as well as the 5*l.* which was struck off the surgeon's bill.

It appeared, however, that a greater part of the expense in this suit was incurred from the course taken by the plaintiffs in going into evidence as to the medical bill, and as witnesses upon this point were first examined by the plaintiffs, it necessarily led to the production of counter evidence on the part of the defendants. These were proper subjects for inquiry in the Master's office.

Under the decree the defendants were to pay the costs of all this irregularity on the part of the plaintiffs; and the decree could not be set right without putting these parties to a great and useless expense. But it was better to put the decree into regular form, even though it might operate hardly upon the parties in this case, for such irregular decrees always led to more expense. It was not right to sanction such a decree, as other suitors might be misled by it; and when they filed a bill against executors, they might be induced to go into evidence upon any item of their accounts where they thought that any particular payment had been improperly made. The defendants must, therefore, be allowed all such part of their costs as was occasioned by the plaintiffs' going into evidence upon the subject of the medical bill. The 5*l.* struck off the bill would be allowed them towards their costs, and all other costs must be reserved.

Wigram, V.C. March 18, 20. } ABRAM *v.* WARD.

Will—Construction—Estate Tail.

A testator devised real estate to his son H. A. for life, and to the heirs of his body lawfully begotten, for ever; and in case his said son should die without children, then over:—Held, that H. A. took an estate tail in the premises.

John Abram, the testator in the cause, being, at the date of his will, seised in fee of a messuage and twenty-five acres of

land, and of a certain other messuage, and thirty acres of land, by his will, dated the 10th of August 1809, gave to his wife Abigail the sum of 10*l.* yearly, *durante viduitate*, to be paid out of his freehold estate, and all the residue of his real and personal estate he gave to his son Hodgson Abram, *and to the heirs of his body* lawfully begotten, for ever; and, in case his son Hodgson Abram died *without children*, the said testator willed that the whole of the property then bequeathed to him should be equally divided among his, the said testator's, surviving grandchildren, share and share alike. In 1817 the testator died, leaving his son Hodgson Abram him surviving, who thereupon entered into the possession of the hereditaments so devised to him. In Michaelmas term, 58 Geo. 3. a recovery was duly suffered by Hodgson Abram of all the devised premises. By indentures of lease and release, dated, respectively, the 18th and 19th of May 1824, Hodgson Abram conveyed the secondly-devised premises to John Mellam in fee; and John Mellam, by his will, dated in 1839, devised the same premises to the defendant Mrs. Ripley, the wife of the defendant John Ripley, in fee. The defendant Ward claimed to be a mortgagee of the messuage and twenty-five acres, under Hodgson Abram, for a term of 2,000 years. In May 1841, Hodgson Abram died, without having been married; and, in April 1845, the plaintiffs, the surviving grandchildren of the testator John Abram, filed their bill against John Ripley and Margaret his wife, and the defendant Ward, claiming to be entitled to the devised property under the limitations of the will. The question raised at the hearing was, whether the estate tail, given by the express words of the will, was cut down to a life estate by the subsequent gift over in case Hodgson Abram died without children.

Mr. Romilly and *Mr. J. H. Taylor*, for the plaintiffs, contended that the words "to the heirs of his body" must be construed, with reference to the gift over, as "children," and that, consequently, H. Abram took merely an estate for life, with remainder to his children; and that on his death without children, the testator's surviving grandchildren became entitled.

North v. *Martin*, 6 Sim. 266.

Right dem. *Shortridge* v. *Creber*, & R. 718; s. c. 5 B. & C. 4 Law J. Rep. K.B. 324.

Greenwood v. *Rothwell*, 6 Beav. s. c. 13 Law J. Rep. (N.S.) Chanc.

Minter v. *Wraith*, 13 Sim. 52.

Gretton v. *Haward*, 1 Mer. 448.

2 *Jarman on Wills*, 96.

Mr. Cankrien, for other grandchil defendants.

Mr. K. Parker and *Mr. Berry*, fo defendant Ward, the mortgagee.

Mr. Humphry and *Mr. Elmsley*, f defendants Ripley and his wife, cont that the estate tail given in express was not cut down by the subsequen over; and that the remainders being tingent were well barred by the recov

Doe d. *Herbert* v. *Selby*, 2 B. & C

Doe d. *Simpson* v. *Simpson*, 4 Bing. 333; s. c. 7 Law J. Rep. (N.S.) 156.

Doe d. *Jearrad* v. *Bannister*, 7 M Wels. 292; s. c. 10 Law J. (N.S.) Exch. 33.

Thornhill v. *Hall*, 2 Cl. & Fin. 2

Doe d. *Strong* v. *Goff*, 11 East, 6

Driver d. *Edgar* v. *Edgar*, Cowper,

Fearne's Cont. Rem. 423.

Mr. Romilly replied.

March 20.—WIGRAM, V.C.—The tion in this case is, whether Hodgson Al at the time of suffering the recovery tenant in tail of the property in questi only tenant for life. The devise to and the heirs of his body, supposing was nothing in the will to controul words, clearly gave him an estate if then he had an estate tail, the rec would convert that into a fee, so entitle the defendants. But it was a that the words "heirs of the body" with reference to the subsequent be read as "children." If that we the Court had to do, the case would n altered; for it would stand thus: a to Hodgson Abram and his childre ever; and, if he die without children, over. In that case the gift would a to an estate tail. It was further a however, that the Court must modi will and reduce the estate of Ho

Abram to an estate for life, with remainder to his children; and the question is, whether there is any ground for so reducing his estate. In all the cases cited, except *Gretton* v. *Haward*, there was an express estate for life, with remainder over; and the question was, whether the superadded words were words of limitation or words of purchase. In all the cases where there was an express estate for life, the Court held that the superadded words were words of purchase. In *Gretton* v. *Haward* there was no express estate for life given; but the property was given generally, and after the death of the party to go in a particular way. Yet, in that case, the Court held, that the party took only for life. In my copy of *Mr. Merivale's Reports*, I find a note that Sir E. Sugden said, *arguendo*, that that case had been overruled, and that Sir John Leach assented to that statement. I do not see any ground for cutting it down to an estate for life. It was said for the defendants, that if it were an estate for life to Hodgson Abram, with remainder to his children, such a remainder was contingent. Then also, if the life estate was destroyed, there was no person to enter, and the recovery would destroy the remainders, which were contingent in the children. But I have no doubt that, on the first ground, Hodgson Abram took an estate tail in the property. The bill must be dismissed, with costs.

ORDER OF COURT,

March 3, 1847.

The Right Hon. Charles Christopher Lord Cottenham, Lord High Chancellor of Great Britain, by and with the advice and concurrence of the Right Hon. Henry, Lord Langdale, Master of the Rolls, and the Right Hon. Sir Lancelot Shadwell, Vice Chancellor of England, doth hereby, in pursuance of an act of parliament, passed in the 3rd and 4th year of the reign of his late Majesty King William the Fourth, intituled, 'An Act for the Regulation of the Proceedings and Practice of certain Offices of the High Court of Chancery in England,' and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following, that is to say:—

I.—That the Master of Reports and Entries of the High Court of Chancery and the Clerk of Reports shall, in lieu and instead of the fees of 2*s.* for the first side, and 1*s.* 6*d.* for every other side, containing two folios of ninety words, now receivable by them for all copies of orders, exceptions, petitions, reports, or other documents, receive and take, for all such copies bespoke after the 4th day of March instant, 4*d.* for every folio of ninety words, and no more.

II.—That this Order be entered by the Registrar of the High Court of Chancery.

COTTENHAM, C.
LANGDALE, M.R.
LANCELOT SHADWELL, V.C.E.

ORDERS OF COURT,

April 13, 1847.

The Right Hon. Charles Christopher, Lord Cottenham, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Hon. Henry, Lord Langdale, Master of the Rolls, and the Right Hon. Sir Lancelot Shadwell, Vice Chancellor of England, doth hereby, in pursuance of an act of parliament passed in the 4th year of the reign of her present Majesty, intituled, 'An Act for facilitating the Administration of Justice in the Court of Chancery,' and of an act passed in the 4th and 5th year of the reign of her present Majesty, intituled, 'An Act to amend an Act of the 4th year of the reign of her present Majesty, intitul Act for facilitating the Administration o in the Court of Chancery," ' and in pursu execution of all other powers enabling hin behalf, order and direct, that the rule a hereinafter set forth shall henceforth be, a purposes be deemed and taken to be a gen and order of the High Court of Chancery,

The plaintiff is not to obtain an order o for leave to amend his bill, after a defendar entitled to move) has served a notice of n dismiss the bill for want of prosecution.

COTTENHAM, C.
LANGDALE, M.R.
LANCELOT SHADWELL, V.C.I

April 21, 1847.

Whereas Andrew Henry Lynch, Esq., one of the Masters of the High Court of Chancery, did on the 25th day of March last resign his office as one of the said Masters. And whereas it is expedient that provision should be made for the due dispatch of such causes and matters as stand referred to him; His Lordship doth order that all causes and matters which stand referred to the said Andrew Henry Lynch, be transferred to John Edmund Dowdeswell, Esq., William Wingfield, Esq., James William Farrer, Esq., Sir Giffin Wilson, Knight, William Brougham, Esq., Nassau William Senior, Esq., Samuel Duckworth, Esq., Sir William Horne, Knight, Sir George Rose, Knight, and Richard Richards, Esq., some or one of them, to be taken by them respectively in such order as th Master of the said Court shall direct. Lordship doth further order, that the said to whom such causes and matters shall res be assigned, do proceed and act therein as Andrew Henry Lynch was to have done; that purpose, all books, papers, deeds, writi accounts that concern the causes and other which formerly stood referred to the said Henry Lynch shall be transferred to the sa ters respectively to whom the said causes and shall be so assigned as aforesaid, and this o be drawn up and entered with the registra said Court.

COTTENHAM, C.

END OF HILARY TERM, 1847.

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery.

EASTER TERM, 10 VICTORIÆ.

M.R. April 16, 17; May 3. } SMITH *v.* THE EARL OF EFFINGHAM.

*Taxation of Costs as between Party and Party—Special Fee on re-hearing to Senior Counsel—Costs of a third Counsel, and of all except one of the Consultations with Counsel preparatory to the Re-hearing, and of Short-hand Writer's Notes of the Proceedings at the Hearing—*120*th of the General Orders of the* 8*th of May* 1845.

On a re-hearing the petition was dismissed with costs as between party and party. On the taxation the taxing Master refused to allow a special fee which had been paid to senior counsel of the common law bar, the costs of short-hand writer's notes of the proceedings at the hearing in the court below, the fees paid to a third counsel engaged on the re-hearing; and also the fees of the second and third consultations preparatory to the re-hearing:—Held, that the Master was correct in the conclusions he had come to in each particular.

The general rule in the taxation of costs as between party and party is, that the client, and not the adverse party, who is ordered to pay the costs, must bear the costs of specially retaining counsel.

The rule of allowing the costs of two counsel only where the taxation is as between party and party, will not be departed from, except in a few very special cases.

No general rule has been laid down in practice since the General Orders of the 8*th of May* 1845 *were issued, as to the number of consultations to be allowed on taxation of costs as between party and party, each case depending on its own particular circumstances.*

The petition of the plaintiffs in this case prayed a reference back to the taxing Master to review his taxation of the petitioners' costs of the appeal, and that the Master might be directed to allow the special fee paid to leading counsel, the fees properly paid to the junior equity counsel, and the charges properly incurred for briefs and copies of documents furnished to such junior counsel, and the fees on consultations properly incurred beyond the fees of the consultation allowed by the Master, and the petitioners' expenses and costs properly incurred in obtaining and making copies of short-hand writer's notes, and the other fees, costs and expenses properly incurred by the petitioners in connexion therewith.

On the hearing of the cause before the Master of the Rolls, it was ordered that the plaintiffs' bills should be retained for twelve months, with liberty for the plaintiffs, or either of them, in the mean time to proceed at law, in an action touching the matters in question in the cause, as they should be advised; and in case the plaintiffs, or either of them, should proceed at law and

to trial within twelve months, his Lordship reserved the consideration of the costs of the suit and all further directions until after the trial should have been had.

Two of the defendants, R. Brown and J. W. Smith, on the 28th of July 1844, appealed against the decree of the Master of the Rolls, when the petitioners' solicitors retained Sir Fitzroy Kelly (in the absence (1) of Sir W. Follett, who was the plaintiffs' leading counsel in the court below), and paid therewith a special fee of fifty guineas, in addition to the fee payable to the counsel usually practising before the Lord Chancellor. Copies of the short-hand writer's notes of the judgment of the Master of the Rolls, on the original hearing, and also of the arguments in reply of Sir W. Follett and of Mr. Turner for some of the defendants on the original hearing, were furnished to counsel on the appeal. Previously to the hearing of the appeal, the petitioners' solicitors had delivered briefs to two counsel at the equity bar, on a motion in the cause, which was by consent ordered to stand over until after the hearing of the appeal, and both those counsel were heard on the plaintiffs' behalf on the appeal, in addition to Sir F. Kelly. The decree of the Master of the Rolls was affirmed on the appeal, which was dismissed with costs. On the taxation of the petitioners' costs of the appeal, the taxing Master disallowed the special fee paid to Sir F. Kelly, and the fees of the petitioners' junior equity counsel, the charges of the petitioners' solicitors for briefs and copies of documents furnished to such junior counsel, the fees of two out of three consultations had with the plaintiffs' several counsel, and all the expenses of obtaining and making copies of the said short-hand writer's notes, and all the other fees consequent thereto, and all the costs of the petitioners' solicitors connected therewith.

Mr. Willcock, for the petitioners, contended, that the case argued at the hearing having been one of great nicety and intricacy, and the Court having required that the plaintiffs should first establish their right at law, it was both natural and proper that the plaintiffs should engage one of the most eminent leading counsel, and that they should not confine themselves to th of two counsel only, one of whom (number of his professional enga might accidentally be absent duri part of the hearing; that there wa rule in practice which disallowed special fee, the services of a third or the costs of the short-hand write that it was not possible for two c conduct securely some of the he that occurred in courts of equity, the present was one of that chara that the short-hand writer's notes peratively called for in the presen order that the Judge in the appell and counsel there, might be in p of the most satisfactory evidence took place at the hearing in t below.

The 120th of the General Orde Court of the 8th of May 1845 (2) following cases, were cited in su the petition :—

Wastell v. *Leslie*, 14 Sim. 84; Law J. Rep. (N.S.) Chanc.
Morris v. *Hunt*, 1 Chit. 544.
Malins v. *Price*, 1 Phil. 590.
Downing College case, 3 My 474.
Nickells v. *Haslam*, 9 Jur. 64

Mr. Kindersley, contrà, conten the plaintiffs could not in practi the taxation of costs was as betw and party, and where the case to b was not of a complicated characte their demand of payment, by the res of the costs and expenses stated petition, and which had been most disallowed by the taxing Master: 120th of the General Orders of t May 1845, did not justify either retaining fees to counsel: that the in *Nickells* v. *Haslam* might be ri reference to the circumstances th there, which might, and very proba special in their nature; but th Judge, in the report of that case, w sented as deciding generally tha fees to counsel were to be allow could not possibly be supported: other case was to be found in special fee had been allowed on

(1) Abroad on account of ill health.

(2) Ord. Can. 333; 14 Law J. Rep. (N. 296.

ation of costs, as between party and party: that as to the fees paid to the third counsel, the ordinary practice was to engage only two counsel, and in the case of *Morris* v. *Hunt* (a case at law) the costs of a third counsel were allowed solely on account of the number of witnesses which were examined: that in *Wastell* v. *Leslie* very special circumstances existed, and the costs were taxed as between solicitor and client; and in *Downing College case* the costs were also taxed as between solicitor and client.

[The MASTER OF THE ROLLS.—It makes a difference whether the costs directed to be taxed as between solicitor and client are to be paid personally or out of a particular fund: in the *Downing College case* the costs were ordered to be paid out of the college fund.]

Mr. Kindersley said that the Lord Chancellor, in that case, said that although the costs were ordered to be taxed as between solicitor and client, the rule was to allow only the fees of two counsel, or of three under special circumstances; that as to the costs of the short-hand writer's notes, which were supplied to counsel, Knight Bruce, V.C., when the case of *Malins* v. *Price* was before him, expressed a strong opinion that they ought not to be allowed. In that case the trial at law, it must be borne in mind, lasted seven days, and the notes contained the evidence taken at the trial, whereas the notes here consisted of arguments of counsel.

[The MASTER OF THE ROLLS. — The Judge's notes are the proper evidence of what occurs in a trial at law, and not the short-hand writer's notes.]

Mr. Kindersley said that the counsel engaged in the cause were expected to take notes of the proceedings at the hearing, and thereby render unnecessary a short-hand writer's notes; besides, in *Malins* v. *Price*, the question at issue, as was observed by the Lord Chancellor, was a very complicated one. As regarded the fees of more than one consultation, the 120th Order of the 8th of May 1845 must be considered as providing for the costs of only one consultation, except where the circumstances were very pecial.

Mr. J. A. Cooke, for the defendant own, in opposition to the petition, insist- hat it was not customary for the Court to allow a suitor to be vexed by sending the case back to the Master for reconsideration, unless there was evidence adduced of a cogent nature to justify that course; and observed that the case of *The Attorney General* v. *the Drapers Company* (3) differed materially from the present case, the question there being as to the costs of the Attorney General, who had a duty quite distinct from that of counsel attending at the hearing to argue a case.

[The MASTER OF THE ROLLS.—The Attorney General has a duty to perform in his official capacity quite distinct from the other parties to a suit, and ought not to involve himself with them.]

Mr. Willcock, in reply.

The MASTER OF THE ROLLS, at the conclusion of the argument, said that the questions that arose upon the present petition were of great importance to the profession, and that as some difficulties had occurred from the parties not knowing clearly what took place before the taxing Master, he should communicate with him before he finally decided the case. His Lordship then observed, that if a solicitor thought fit to employ counsel whom he could not retain without great and extraordinary expense, it was a matter of consideration whether in doing so he ought to be repaid by the opposite party all that he had laid out. Short-hand writers' notes formed also a subject of importance. Counsel who were engaged to attend the proceedings in a cause might be considered bound to attend the whole hearing of it, and they had imparted to them a knowledge of all that took place at the hearing; but if they (by reason of their absence) did not inform themselves of what took place, it might be very well to resort to short-hand writers' notes; but if the necessity of obtaining such notes arose from the neglect of one party, could that be ground for throwing the expenses so occasioned on the opposite party? There was a great disadvantage in counsel attending to causes in different courts at the same time; but as this case came before the Court as a matter of right between party and party, the Court could not fix on one party the costs of that which the other party ought

(3) 4 Beav. 305.

to have done. As to a third counsel, it was important on a re-hearing to have the same counsel as were engaged in the cause on the original hearing; and the late Sir John Leach, M.R. desired his Lordship, when at the bar, to cease a practice which he had commenced, of confining himself to one Court exclusively. In the present case, from necessity, a different leading counsel was employed at the re-hearing, and also another and different junior counsel, and the costs in respect of three briefs were desired to be allowed. There must be some very good reason, indeed, for the employment of such additional counsel, and it was said that the case, viz., that of the re-hearing, was a difficult one. An original hearing of a long and complicated case was a very different thing from a re-hearing of the same case. The original hearing was often attended with great difficulties, and beforehand counsel frequently could not see what the difficulties of the case were, or what difficulties would arise in it. Accidents would happen in a cause without imputation on any one; and after a great mass of evidence had been read through, points in the cause might escape the attention of the most vigilant minds. After all this necessary process had been gone through, and the different parties had stated their views, the cause came on. It was then seen where the strength lay of the opposite side, and the other party then decided to have the matter discussed elsewhere, where there was no longer occasion for the strength and assistance requisite at the original hearing. As to the consultations, whether more than one should be allowed was a matter of some consideration. With counsel well acquainted with the practice and law of the court there were very many cases that did not require more than one consultation; but if a counsel of great experience be brought into a court of a totally different character, it might be absolutely necessary to have several consultations. The question thus really was, in such a case, whether, in the ordinary transaction of business, after a full original hearing, where the evidence was in writing and not given by parol, all these consultations were to be allowed. What the petitioner asked was, not that the report should be referred back to the Master to have the different items specified in the petition allowed, but an order that th directed to re-consider his repo an order ought not to be grant Court was satisfied that the M proceeded on a proper princi not considered the matter fully. Order of May 1845 was made tension of the rights of parties equity, giving them rights to re in several particulars where pre had no such right. His Lordsh his observations by stating th mention the case again, after h tained from the taxing Mas principle he had disallowed items forming the subject-m petition.

May 3.—The MASTER OF T In this case, after a re-hearing of this Court, the Lord Chancel the petition with costs to be t tween party and party. T costs have accordingly been t taxation several items of charge to 133*l.*, have been disallowed. tion prays a reference back t to review his report as to the of these items. On the taxatio between party and party, the General Orders of May 1845 Master to allow all such just a expenses as appear to have b incurred; but the same Orde taxing Master is not to allo which do not appear to have b or proper for the attainment of defending his rights, or which a been incurred through over-c gence, or mistake, or merely a the party." The charges disal Master in this case are, first, paid to a common-law coun the costs of transcripts of short notes; third, the fees paid counsel on the re-hearing; the fees paid for a second and tation with counsel previous to ing. Since the case was last have communicated with the ta and have received from them in effect as follows:—First, a ployment of a special counsel, rule in the taxation of costs b and party is this, that if a cou

cially retained the party retaining such must bear the expense thereof; second, the general rule as to short-hand writers' notes is, that on a re-hearing, the expense of having them is not allowed as costs between party and party; third, as a general rule, the fees to two counsel only are allowed, though in some few very important cases the rule has been departed from; fourth, as to the number of consultations, there had been no general rule laid down since the issuing of the Orders of the 8th of May 1845, but that each case depended on its own particular circumstances. Such is the nature of the certificate, and on seeing it, my opinion is confirmed that the Master has done right in disallowing these several charges. As regards the special retainer of counsel, parties have a right to engage any counsel they choose, and the Master ought to allow all proper fees paid to such counsel: he has done so in the present case; but a party cannot be permitted to charge against an adverse party the expense of specially retaining a counsel practising in another court. Such a charge for extra costs is not necessary for the attainment of justice, and it would tend to great injury and oppression to allow the same against the adverse party.

As to the short-hand writer's notes, a difference of opinion seems to have arisen amongst the taxing Masters, and the certificate on this point is signed by five only out of six of the Masters. There is no doubt about the value of them; but the question here is not whether they are useful or convenient, but whether an adverse party who is ordered to pay costs is, in addition to the costs attendant on the employment of counsel, to pay also for short-hand writers' notes. If the counsel and solicitor in the cause attended in court during the hearing of the cause, their account of the proceedings, though not a literal one, would afford the accurate substance of what occurred, though in a condensed form, and in many cases would be more likely to be useful than the fuller notes of the short-hand writer. If the counsel and solicitor in the cause be not in attendance, they may be unable to learn what took place at the hearing without the aid of short-hand writers' notes; but why should the adverse party pay the costs of information obtained by these means, when it is the clear duty of counsel and solicitor to be present at the hearing? Owing to the contemporaneous sittings of the several courts, it may not be practicable for some counsel, especially the most eminent, to be present at the hearing. Sometimes such counsel are engaged with a knowledge at the time that their attendance is doubtful, the client thinking it advantageous to take the chance of their attendance at the hearing; and arrangements may be made to secure the requisite information for such counsel through the medium of short-hand writers' notes. This proceeding would create additional expense, but the party must consider whether he will incur such expense or not, and can arrange accordingly with his solicitor; but if no arrangement be made, and the aid of short-hand writers' notes be found necessary, the additional expense arising therefrom must fall on the client, and not on the adverse party.

As regards the employment of a third counsel at the re-hearing, nothing has been adduced before me proving the reasonableness of throwing the expense of that proceeding on the adverse party. The retainer of a third counsel may be necessary in some cases, but the general rule is otherwise. Very special circumstances may exist to justify the employment of a third counsel, but here there were only two counsel employed at the original hearing; and the re-hearing, as I observed when this case was argued before me, is attended with much less difficulty than the original hearing; and I am of opinion that at the re-hearing of this cause the retainer of a third counsel was not necessary, and the more especially so as the assistance of a third counsel was not deemed requisite at the original hearing.

The charges for three consultations with counsel I consider also unreasonable. Counsel who attend these courts are supposed to be familiar with the practice of them and the law, and an able solicitor can put counsel in full possession of all the facts of his case at one consultation. I must assume this to be so, otherwise it would be impossible to place any limit to the number of consultations with counsel. I can conceive a case where the costs of more than one consultation with counsel might be justified, but satisfactory grounds must always be shewn to justify such a charge being made. I must

in all cases take for granted that counsel read their briefs and are attended by an experienced solicitor. Considering then the Master to be correct in the conclusion he has come to, the petition must be dismissed with costs.

L.C. April 13, 14. } APPERLY *v.* PAGE.

Railway Company — Provisional Committee—Demurrer—Partners—Parties.

A bill was filed by a few shareholders in a railway company, on behalf of themselves and the other shareholders, against the provisional committee. The bill stated (among other things) that the undertaking had been abandoned, and stated also various acts of improper conduct on the part of the defendants, and that a sum of money had been paid into court in respect of the undertaking, and that a majority at a meeting of the shareholders had decided in favour of proceeding with the scheme. The bill prayed that an account might be taken of all the expenses incurred in the prosecution of the undertaking, and that the plaintiffs and the other shareholders might be declared to be liable only to a proportion of the expenses properly incurred, and that the defendants might pay all the other expenses, and that the funds in court might be paid out to the plaintiffs and other shareholders. To this bill the defendants demurred for want of equity, and for want of parties, on the ground that the parties who formed the majority at the meeting, and also that other persons who had signed the parliamentary contract without taking any shares, ought to be before the Court. The demurrer was overruled.

The statements of the bill and the decision of Knight Bruce, V.C. upon the demurrer, are reported *ante*, p. 100.

The defendants appealed from his Honour's judgment.

Mr. Speed, in the absence of *Mr. J. Russell*, in support of the demurrer.—The plaintiffs shew no title to sue on behalf of themselves and the rest of the shareholders. It is, in effect, a suit for the dissolution of the company. All the shareholders are necessary parties, as much so as if a dissolution were expressly prayed. There has been no act of parliament to incorporate it; it a projected company. The bill ask: claration that the company has faile that the expenses since incurred may allowed. There is no partnership i: The object has failed. When those b are discharged there is no continuin nership. This is, consequently, not in which one shareholder can sue on of himself and others. The quest do the plaintiffs represent the sharel at large? The liberty to sue on of other shareholders is an exceptio the general rule. Does this case within the exception? The exc are where there is a clear commu interest, and the object of the suit is festly for the advantage of all on behalf the plaintiffs sue, as where a seeks to have a fund brought back common benefit of all. The Vice cellor said the plaintiffs are without r if they cannot sue in this mode. The Vict. c. 111. s. 22. contains express sion for this case.

The second ground of objection i the plaintiffs have not made the m who were parties to the resolution pa the bill. The plaintiffs sue on behalf not excepting those who voted for goi

[The LORD CHANCELLOR.—If the b prayed that the costs might be disa against some and not against all, th might be different. Here it prays w given effect to, would be beneficial t

The question is not whether th would be beneficial to all, but whetl interests are identical; whether they entitled to the same relief. The n parties who subscribed the parliam contract are not parties to the suit.

[The LORD CHANCELLOR.—The alle is, that they have no interest at all money was paid. They were merely to fill up the parliamentary number.]

Still they would be liable. The tion that their names are unknown have been an answer prior to the Re tion Act. The bill states that all the sites of the act of parliament were co with, and that the plaintiffs obtained of the parliamentary contract whic tains the name, description and ab each subscriber. The plaintiffs ou all events, to have excepted those

They should have sued on behalf of all except those.

Thirdly, the bill does not ask the right relief. If entitled at all, they would be entitled to all the money back, without any deduction for expenses.

Mr. Rolt and *Mr. W. T. S. Daniel* appeared to support the bill, but were not called on.

The authorities which were cited were also referred to before the Vice Chancellor, except

Wilson v. *Stanhope*, 10 Jurist, 421.

Sharp v. *Day*, 1 Phill. 771; s. c. *ante*, p. 1.

In the course of the argument the Lord Chancellor observed on the case of *Richardson* v. *Hastings* (1), that there were questions in that case between co-plaintiffs, and that the demurrer was allowed on the special facts of the case.

April 14.—The Lord Chancellor.—This case came before me upon a general demurrer for want of parties; and the want of parties is alleged to be, that those who were alleged in the bill to constitute the majority of a certain meeting of the subscribers to the undertaking are not made defendants: the bill being by certain shareholders on behalf of themselves and all other shareholders except the defendants. But in the course of the argument, the objection was a little varied from that which was visible on the face of the demurrer; and not only was the absence of those parties insisted upon, but also that a certain number of persons, the holders of 955 shares, also ought to have been parties to the suit. Now, the outline of the case made by the bill is one which, but for the special circumstances stated in the bill, it is admitted would not be open to demurrer, upon the authority of the cases which have been recently decided, and which must be considered as now laying down the rule of the Court. The bill states a plan which was suggested for a railway, under which many persons came in as subscribers, and among others the plaintiffs. It alleges that sums of money were paid by those who so became members, the plaintiffs among the rest. It states then that the plan of the railway is entirely at an end, from there never having been the means furnished to carry it into effect; from there not having been a sufficient number of subscribers or sums subscribed; and, above all, it states that the attempt to obtain a bill failed, and, consequently, according to that statement, for various reasons stated on the face of the bill, the speculation has ceased to be a speculation, and the plan has entirely failed. For the purpose, therefore, for which these persons came together, and for which the money was subscribed, it is stated on the face of the bill to be no longer an existing purpose. Then the bill, after asking for certain directions with respect to the amount of deductions which the defendants are to have, prays for an account of the expenses incurred; that the remainder is to be divided among the plaintiffs and the other shareholders, in proportion to the sums which they have so subscribed. Now, upon that statement, if you take out for the present purpose those allegations in the bill on which the argument assumed a special form, it is neither more nor less than the case that was before me in *Wallworth* v. *Holt* (2), when, after reviewing all the cases, I was of opinion that the rule of this Court permitted a plaintiff to sue on behalf of himself and others in a case precisely similar to the case which is now stated, being the case which appears on the bill without reference to the particular facts which I am now about to advert to. The general demurrer, therefore, it is quite clear, cannot be sustained: there is no ground for it. If that case is right, and until I am corrected by a higher authority I shall act upon it, the rule laid down would be a precise guide to the decision of this case.

But, it is said, there are here certain specialties which would require to have certain other parties to the cause, because they cannot be said to be represented by the plaintiffs suing on behalf of themselves and the other shareholders, except the defendants: and those two special circumstances are comprised in two distinct allegations on the face of the bill. In order to make that intelligible, however, and to understand how that bears on the general rule of the Court, it is necessary to state that the bill represents the

(1) 7 Beav. 301, 323; s. c. 13 Law J. Rep. (N.S.) Chanc. 129, 142.

(2) 4 Myl. & Cr. 619; s. c. 10 Law J. Rep. (N.S.) Chanc. 138.

conduct of the defendants, the directors, as having been very improper with respect to the interest of those for whom they were acting, among others for the plaintiffs; because, it is said, they never had subscriptions to justify them in applying to Parliament, and they never had a prospect of being enabled to carry on the scheme for which they had collected subscriptions, and that they knew that at a very early period: notwithstanding which, they represented that their subscriptions were full, and induced, therefore, persons to become members of the projected company upon a representation which the directors themselves knew to be false. Then, after stating the mode in which they represented the money subscribed to be greater than it really was, the plaintiffs charge "that no shares or certificates of shares representing the said subscriptions were ever issued to or taken by the defendants, and no part of the monies which by the said parliamentary contract were represented to be paid by way of deposit upon the subscriptions was ever paid by the said defendants, or any of them. And that the remainder of the said 3,515 shares, namely, 955 shares, were subscribed for nominally by various persons at the instance and by the procurement of the said defendants, but no shares or certificates of shares were ever issued to the persons so subscribing, or any of them, and no part of the monies which by the said parliamentary contract were represented to be paid by way of deposit upon the last-mentioned subscriptions was ever paid by such persons respectively, or any of them. And that the names of the said persons so nominally subscribing the said parliamentary contract are unknown to the plaintiffs, and they are unable to ascertain the same, but they are known to the said defendants and they refuse to discover the same." It states, therefore, that in order to make up the number which is required by the rules of parliament, certain shares were represented as having been taken up by certain parties, who however were not really shareholders, who never paid their subscription, and never were, in fact, shareholders, for the purpose of filling up the number required by the rules of the House of Commons. Then, it is said, that these 955 persons ought to be defendants, because their case is not a case common with the plaintiffs; that they must hav themselves to the transaction imp carried on by the defendants in this and therefore they are parties to the of trust; and that if they have any i of course they could not be made with those who are represented plaintiffs as complaining of the br trust. That would, undoubtedly, c very material difficulty, if it stood on the allegation that such 955 sha been so ostensibly allotted; but the the allegation that the plaintiffs are i who the persons are to whom those were allotted, and cannot discove names, but the defendants know w are, and can discover their names. not disputed that in an ordinary c allegation that the plaintiff cannot d their names is an excuse for not makin parties, so that a demurrer for not them parties cannot be sustained; b if that allegation is true, and it taken to be true, it would be com the plaintiffs to do that which by po they cannot do. Then it is said t statement cannot, by possibility, b because the parliamentary contract shew who the parties were. You challenge the truth of the allegati demurrer, and it stands there admi be true. If it be admitted to be tru is no case on the part of the defend complain that those 955 persons parties to the suit.

The other case is pretty much of t character, though not accompanied same allegation. It states, that ac to what was required by parliamen certain time during the last session, ing was called of the company to c whether they would go on with the lation or not: and then the bill f purpose alleges such a meeting, an "that the plaintiffs, and various othe holders in the said company, on whos the plaintiffs acted, then caused the to be recorded at the said meeting proceeding with the said bill, but t defendants, by means of scrip cert which they had purchased, or cause held by persons under their influen by various undue means, procured rity of votes at the said meeting recorded in favour of proceeding w

said bill, and the said defendants allege and pretend that a majority of the shareholders in the said company sanctioned and approved of the said bill, and authorized the said defendants to proceed therewith, whereas the plaintiffs charge the contrary of such pretence to be true, and that the said defendants had, prior to the said meeting, and in order to enable them to obtain an authority to proceed with the said bill in parliament, purchased or procured to be purchased for small sums of money a large number of scrip certificates of shares in the said company, to an amount sufficient to enable them to carry a resolution at the said meeting in favour of proceeding with the said bill, and they, in fact, carried such resolution at the said meeting, by means of the said scrip certificates so purchased or procured to be purchased by them."

So far as the defendants may themselves have purchased shares, and so entitled them to a larger influence at the meeting than they were entitled to in respect of the shares they actually held, it is merely an allegation affecting the conduct of the defendants themselves. But they say that the other persons became invested with shares for this purpose; and the objection stated on the demurrer is, that the majority, that is, all those who constituted the majority, ought to have been parties to the suit, upon the ground that they were parties to authorizing the defendants to proceed, and, therefore, they cannot now insist that the defendants were wrong in proceeding, one object of the bill being to have disallowed, as against the defendants, sums of money expended by them in the proceedings subsequent to a certain period which would include the period after this meeting. Now, in order to sustain that objection, it must be shewn that this allegation alleges that which would constitute a defence on the part of the defendants against a claim made by any part of that majority. It may be, no doubt, that a case may be ultimately established on the part of the defendants, shewing that some persons who are now associated with the plaintiffs, as being represented by them, may have been parties to the breach of trust—parties to the misconduct—and, therefore, disabled from complaining of what the defendants have done. If that should be made out hereafter, it may create a considerable difficulty in the plaintiffs' proceeding associated with those who themselves have sanctioned the breach of trust complained of. But that is not now the question. The question is, whether there is on the face of the bill such conduct imputed to any of the plaintiffs, or those represented by the plaintiffs, which amounts to a breach of trust, and which, therefore, would be a defence for these defendants against the persons so suing. This allegation does not do that. It is quite consistent that persons who may have been members of that majority, have voted for proceeding with the bill, but voted, according to the allegation of the bill, under a misrepresentation made by the defendants, and therefore, under circumstances which enabled them to say, Although I voted for proceeding with the bill, I voted for it under an impression which, by a fraud, you had produced, and, therefore, I am not at all bound by the vote I then gave, authorizing you to proceed, that vote being obtained by your misconduct. The mere allegation that they constituted part of the majority cannot possibly amount to that connexion with the breach of trust imputed to the defendants which would prevent them from complaining of the conduct of the defendants.

These are the only two parts of the bill which appear to me to distinguish this case from the other cases which have been decided, and in which it has been held that a bill may be maintained by certain shareholders on behalf of others. I am, therefore, of opinion that the judgment of Vice Chancellor Knight Bruce was correct, and that this appeal must be dismissed, with costs.

V.C.
Jan. 20; April 30. } WALL *v.* WALL.

Legacy—"Election"—"Chose in Action"—Interest—Income Tax.

A testator devised his estates to trustees, and directed them to pay his wife an annuity of 1,800*l. clear of all taxes and deductions whatsoever. He also directed his trustees to invest* 18,000*l. in the funds, and pay the interest to his daughter for life, for her*

separate use, and afterwards to her children, and directed that as his daughter would be entitled to a sum of 12,000*l. and upwards under his marriage settlement, the said sum of* 18,000*l. was to be abated and reduced to such an amount as she should receive under such settlement,—it not being his intention that she should be entitled to her portion under the settlement as well as to the* 18,000*l. The daughter married, and no settlement was made upon her marriage. The questions raised were, whether the daughter could elect to take either under the settlement or the will —whether she was entitled to interest upon the legacy immediately from the death of the testator, and whether the widow was entitled to her annuity of* 1,800*l. clear of income tax:—Held, that the interest of the daughter being a chose in action in remainder, which was incapable of being given up* in præsenti, *an election by the daughter could not be decreed against the dissent of the husband, in a suit where the husband and wife were co-defendants.—Held, also, that interest upon the legacy was not payable for the first year after the testator's death; and that the widow's annuity would not be clear of income tax.*

Several questions were originally raised on this case, but the only points argued arose upon the following facts:—

The testator, William Wall, by his will, dated the 29th of July 1842, after directing payment of his debts and legacies, devised certain freehold estates to trustees, upon trust, out of the rents and profits thereof, to pay to his wife for life, an annuity of 1,800*l.*, clear of all taxes and deductions whatsoever. The testator then devised other estates to his son. And as to all and every his money in the funds, bonds, bills, notes, mortgages, and securities for money, and other his personal estate whatsoever and wheresoever, not thereinbefore disposed of, he gave and bequeathed the same to his trustees, their executors, administrators, and assigns, upon trust, as to the sum of 18,000*l.*, and which he charged upon his real estates in case his personal estate should be insufficient, to lay out and invest the same in the purchase of government stocks, or freehold, leasehold, or copyhold securities in England, and stand possessed of and interested in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, upon trust, during the life of his daughter Millicent, to pay the same to his said daughter, for her separate use; and on the decease of his said daughter, upon trust, as to the sum of 9,000*l.*, for the children of his said daughter, as she should appoint, and in default of appointment, and so far as any such appointment should not extend, upon trust, for the benefit of her children, to be divided between them equally: and as to the remaining 9,000*l.*, upon trust, in like manner, for the benefit of her children. And the said will contained the following clause:—"Whereas, my said daughter Millicent, under my marriage settlement will become entitled, as a younger child, to upwards of 12,000*l.*, now, I do hereby declare my will to be that so much of the said sums of 9,000*l.* and 9,000*l.* so hereby given to or in trust for her, shall be abated and reduced to such an amount as she shall be entitled to receive as a younger child aforesaid, it not being my intent and meaning that my said daughter should be entitled, under the said settlement to her said portion as a younger child, as well as the said sums of 9,000*l.* and 9,000*l.* And I do hereby will and direct, that the provisions in and by this my will made for my said wife and children respectively, are so made for them, and that they shall respectively accept and take the same, in full discharge, lieu, and satisfaction of and from all and every the estate, sum and sums of money, and other provision given and made for them in and by the settlement made previous to my marriage with my said wife Elizabeth Shearing, dated the 11th of September 1802," &c. And the testator further declared, that the provisions thereby made in favour of his children were intended to be in addition to the property settled upon them at their marriage. The testator died, leaving his wife and one son, and his daughter Millicent, surviving him. The daughter married the Baron de Thoren, but no settlement was made previous to their marriage; but subsequently thereto the testator, W. Wall, settled certain freehold and personal property upon trustees for the benefit of his said daughter and her children.

The suit was instituted for the administration of the testator's estate, and it was

referred to the Master to inquire and state whether it would be for the benefit of the Baroness to take under the settlement made upon the marriage of the testator, or under his will.

The Master found that it would be for her benefit to take under the will. The cause now came on upon exceptions to the Master's report. The Baron and Baroness de Thoren were made co-defendants to the suit, and put in a joint answer.

The questions argued were, whether the Baroness de Thoren was entitled to elect whether she would take under her father's settlement, or under the will; and if she elected to take under the will, whether the Baron de Thoren, her husband, would be bound by such election, and would be compelled to give up any rights which he might have acquired by operation of law in right of his wife under the said settlement. The following questions were also raised: whether the Baroness was entitled to interest on her legacy from the death of the testator, or from the expiration of one year after his death; and whether the annuity given by the testator to his widow, "clear of all taxes and deductions," was exempt from the income tax.

Mr. Stuart and *Mr. Greene* appeared for the plaintiff, who was the first tenant in tail under the testator's will.

Mr. Walker and *Mr. Dickinson*, for the eldest son of the testator.

Mr. Parry, for the Baroness de Thoren.

Mr. Bethell and *Mr. Malins*, for the Baron de Thoren.

Mr. Sidebottom, for the widow of the testator.

Mr. J. Parker, for the children of the Baroness; and

Mr. Koe and *Mr. Stinton*, for the trustees of the testator's marriage settlement.

For the Baroness de Thoren it was contended, that she had full power to elect whether she would take under the settlement or the will; that such power was not subject to the controul of her husband. It was evident that the testator intended that his daughter should not take under both, and if so, her election ought to bind the husband. The following cases were cited:—

Ardesoife v. *Bennet*, 2 Dick. 463.

1 *Roper on Husband and Wife*, p. 30, Mr. Jacob's note.

Bradish v. *Bradish*, 2 B. & B. 479.

Vane v. *Lord Dungannon*, 2 Sch. & Lef. 118.

Parsons v. *Dunne*, 2 Ves. sen. 60.

It was also contended that the Baroness was entitled to interest upon the legacy from the death of the testator—

Lowndes v. *Lowndes*, 15 Ves. 301.

Newman v. *Bateson*, 3 Swanst. 689.

Dowling v. *Tyrell*, 2 Russ. & Myl. 343.

For the Baron de Thoren it was contended, that there having been no settlement made upon his marriage with his wife he would be entitled, in right of his wife, to the several sums of stock and cash comprised in the settlement on the testator's marriage: the law could not interfere with his marital rights; it had no power over him. This was at present a reversionary interest in a chose in action, expectant upon the death of the testator's widow, and it could not therefore be dealt with. If the husband survived the tenant for life, he would be clearly entitled to the fund settled upon his wife at the time of her father's marriage, and that right could not be affected by the election of the Baroness. The following cases were cited in support of this argument—

Jordan v. *Jones*, 2 Phil. 170; s.c. *ante*, p. 93.

Brodie v. *Barry*, 2 Ves. & Bea. 127.

It was contended, for the widow, that she was entitled to the annuity of 1,800*l.*, clear of income tax, the testator having said that she should receive that sum clear of all taxes and deductions whatsoever.

The Vice Chancellor.—I have read over the papers in this case, and I see no difficulty with respect to any one of the questions which have been brought before me, except that which regards the election. In the first place, with respect to the question, such as it is, about the interest for the first year, it appears to me that interest cannot be payable for the first year, because the provision is a general legacy. It is true that the legacy is to a child, but to an adult child, and also to a child with respect to whom it appears there was a provision made, although there is no direction as to maintenance; and therefore I think, with regard to the law as it is laid down in the case of *Raven* v. *Waite* (1), which appears

(1) 1 Swanst. 553.

to state the law very clearly, that it is quite plain interest for the first year is not payable.

Then, with respect to the question about the payment of the annuity free from property tax, it really appears to me that there is nothing in it. I have looked at the language of the 102nd section of what is now called the Property Tax Act (2), and it is quite plain there, that by the express law the thing that is given is the thing that is to pay; and this expression can never be so twisted as to mean this, that whatever may be the fate of the country with respect to any property tax that may be imposed during the continuance of the annuity, it is to be taken as if it were the gift of an annuity, with such a variable, perpetually increasing and decreasing proportionable addition as shall leave, after the payment of the property tax, the annuity of a given amount. The words amount to nothing like that; and my opinion therefore is, that the annuitant is liable to pay the property tax. Then, with respect to the question of election, this is to be observed, that, in the first place, it is not a case of election in the common sense of the word, where the election arises simply by a person making a disposition as his own of that which is not his own; but here there is a double declaration. In the first place, in the will the testator expressly directs, in very singular words, that the amount which he has given by the will shall be diminished by the amount of the provision which has been made by the settlement; and then, in a subsequent part he expressly declares, in language somewhat inconsistent with the first, that that which is given as a provision by the settlement shall itself be given up in case the party takes that which is given by the will. Therefore, he has, in fact, expressly declared that it shall be given up if the gift of the 18,000*l.* takes effect. Then there is this most remarkable circumstance, that the provision, as it now stands under the settlement, is a chose in action of the wife's in remainder, which will not take effect in possession until the death of her mother; and it does not appear to me that there is any method now known to the law by which *in præsenti* that reversionary interest can be absolutely given up. It cannot, with certainty, be released, nor can it be assigned; and it appears to me, moreover, that there is this further difficulty, that if the question is, whether the election which the Court might make upon the Master's report in favour of the wife is to prevail, I do not see very well how it can prevail against the dissent of the husband; and I do not very well see how the question, whether it can be carried into effect against the wish of the husband can be determined in the cause, constituted as it now is, with the husband and wife co-defendants; and therefore, if the parties really think that during the life of the mother anything can be done effectually in the way of decision with respect to this case of election, it appears to me that the matter must be brought before the Court in some way, so that we may have the husband and wife as adverse claimants, for otherwise I do not think the Court has any jurisdiction; and, consequently, all that can be done at present, as the matter now stands, for some confusion has arisen, I admit, by investing the settlement-money in land, is merely to direct that the sum of 18,000*l.* should be set apart to abide the ultimate decision of the Court whenever the thing is in such a state as that the Court can really decide it; but, at present, I do not think that I have any jurisdiction whatever to decide on the question of election against the husband, who dissents from the view which the wife takes.

(2) 5 & 6 Vict. c. 35.

M.R.
Jan. 16; May 6. } LANCASTER *v.* EVORS.

Principal and Surety—Interest—Debtor and Creditor.

The estate of A. having been decided to have been charged by way of surety only for securing payment of the mortgage and specialty debts of B, and to be entitled to be recouped the sums paid thereout due from B.'s estate, it was held, that the personal representatives of A. were not entitled to interest out of the estate of B, on the sums so paid.

For the facts of this case, *vide* the judgment of the Master of the Rolls on the hearing, *supra*, p. 9.

Mr. Purvis and *Mr. Malins*, for the plaintiff, a creditor of Lady Pryce's estate, now contended, that Lady Pryce's estate ought to receive interest from Sir J. P. Pryce's estate, on the amount paid by the former estate, in respect of the mortgage and other debts of Sir J. P. Pryce; that although the debt might be considered a simple contract one, still interest would be given upon it, as a surety was entitled to a transfer of any instruments securing the debt, on his paying it off, and those instruments in the present case consisted of a mortgage security, and the covenant of Sir J. P. Pryce; that the mortgage security was represented by the large sum of money in court, and must be considered real estate as much as if the estate had remained in specie and unconverted; that the delay which occurred was occasioned by Jacques and Hughes, the creditors of Sir J. P. Pryce, and the creditors of Lady Pryce were in no way chargeable with laches. The cases of—

Copis v. *Middleton*, 1 Turn. & Russ. 224; s. c. 2 Law J. Rep. Chanc. 82.

Jones v. *Davids*, 4 Russ. 277; and

Du Vigier v. *Lee*, 2 Hare, 326; s. c. 12 Law J. Rep. (N.S.) Chanc. 345,

were cited on behalf of Lady Pryce's creditors.

Mr. Kindersley and *Mr. Turner*, contrà, for the heir-at-law and executor of Sir J. P. Pryce, contended, that fifteen or sixteen years having elapsed since the last payment was made by Lady Pryce's estate, no encouragement ought to be given to the present demand; that a surety paying off a specialty debt did not stand in the place of the original creditor; that the present case was nothing more than that of a party being in possession of funds as a trustee for another person, *i. e.* for the heir-at-law of Sir J. P. Pryce, who has a right to claim payment of interest on the sums paid by him as heir-at-law in satisfaction of the debts due from Sir J. P. Pryce's estate; that, at all events, the Statute of Limitations precluded any demand of interest for more than a period of six years.

Mr. Purvis, in reply.

May 6.—The MASTER OF THE ROLLS, after stating the particulars of the plaintiff's claim, as the personal representative of a creditor of Lady Pryce, against the estate of Sir J. P. Pryce, expressed his opinion, that the personal representatives of Lady Bryce were not entitled to claim interest in respect of the sum recovered against Sir J. P. Pryce's estate; and that the plaintiff claiming through those parties could not be placed in a better situation.

L.C. March 27; May 7. } *In re* SPENCE.

Infant, Custody of—Habeas Corpus—Petition—Jurisdiction.

The Court has jurisdiction, on the petition of a parent or guardian, to order infants to be restored to the proper custody without a bill being filed.

A mother had removed her infant children, and was residing with them at some place which was not known to the husband; but the trustees of her marriage settlement were in communication with her, and remitted dividends to her. The husband obtained a writ of habeas corpus *against the trustees for the delivery of the children. The trustees stated, that the children were not in their custody or under their controul. The Court refused to make any order against the trustees, although they were aware of the residence of the mother; nor would it controul their right to transmit the dividends to her.*

This was a petition, by way of appeal, to discharge two orders of the Vice Chancellor of England of the 12th of February 1847 and the 3rd of March 1847.

Mr. Spence had presented a petition, which was heard before the Vice Chancellor of England, and which contained statements to the following effect:—On the 26th of January 1839, Christopher John Spence intermarried with Elizabeth Christiana Davidson. Previously to the marriage they executed a settlement by which certain funds, in which Mrs. Spence had a contingent interest, were covenanted to be assigned to trustees for the benefit of Mr. and Mrs. Spence for their lives, with remainder to the children of the marriage. Mrs. Spence was entitled to the income for her separate use. William C. Newby (who was one of the

original trustees) and James Christopher Davidson (a brother of Mrs. Spence) were the present trustees. There were three children of the marriage, the eldest aged six years and nine months and the youngest between three and four years of age. In September 1842 Mr. Spence left the Church of England and joined the Church of Rome. In August 1843, before the youngest child was born, Mr. Spence broke up his establishment at Stockton-upon-Tees and came to London, leaving Mrs. Spence and the two children at Stockton with Mrs. Davidson, his wife's mother. On the 14th of September 1843, Mr. Spence returned to Stockton and saw his wife and children at Mrs. Davidson's house. On the following day he endeavoured to find some lodgings for himself and family, but did not call upon them during that day; and on the 16th of September 1843 he ascertained that his children had been removed by Mrs. Davidson, Mrs. Spence, and J. C. Davidson, on the 14th of September. Shortly after Mrs. Spence left Stockton the third child was born, of whose name Mr. Spence was ignorant. Mr. Spence was unable to discover where his wife and his children resided, but Newby and Davidson knew their place of residence and remitted to Mrs. Spence the dividends which became payable to her under the trusts of her settlement. Some letters had passed between Mr. Spence and his wife, through the medium of Davidson, in reference to the custody of the children, and proposals were also made for a separation and other matters, but no definite arrangement was ever made.

Mr. Spence prayed, by his petition, that Mrs. Spence, Mrs. Davidson, J. C. Davidson, and W. C. Newby might be ordered to deliver up to him his children, and that he might be quieted in the possession and custody of their persons, and in the controul and management of their bringing up and education; and that, if necessary for effectuating these purposes or any of them, a writ or writs of *habeas corpus ad subjiciendum, recipiendum et faciendum* might be issued, directed to Mrs. Spence, Mrs. Davidson, and Messrs. Newby and Davidson, and that service of the petition upon Newby or Davidson should be good service upon Mrs. Spence.

On the 12th of February 1847 the Vice Chancellor of England made an order on motion, whereby, after reciting an by Mr. Spence, the father, he orde writs of *habeas corpus* should issue to Mrs. Spence, Mrs. Davidson, J. vidson, and W. C. Newby, to bi infants to the bar of the court on t of February. On the 17th of Feb writ of *habeas corpus* was according on J. C. Davidson, and on the February on W. C. Newby. On t of February Davidson returned the court, with the following return i viz., "The within-named J. C. I doth hereby certify to the right hon the Lord High Chancellor of Great that the within-named E. C. Spe Spence, and —— Spence, the infa dren of C. J. Spence, or any or any them, are not or is not now nor ev or was in his custody or power or manner under his controul, nor is he bring them or any or any one of the the High Court of Chancery, as req the writ of *habeas corpus*, to which the return." This return was supp an affidavit, and on the same day made a similar return. On the March 1847 the petition of Mr. Spe heard before the Vice Chancellor Torriano appeared on behalf of D and Newby, to see that the returns writ were made known to the Co not upon the petition. The Vice cellor made an order on the petition the 3rd of March 1847. After reci petition, and that no one appea Davidson and Newby, and an affi Mr. Spence and of Joseph Dugdale man Catholic priest, it was order Mrs. Spence, Mrs. Davidson, J. C. son, and W. C. Newby should resp deliver up to Mr. Spence his three children (naming them), and that se that order on Davidson and Newby be deemed good service on Mrs. Spe Mrs. Davidson. The affidavit of J stated that on the 15th of Septen had seen J. C. Davidson with Mrs. and two children, whom he believe the petitioner's children, waiting at t lington station of the Stockton and I ton Railway, and that they appeared to be about to commence a journey.

The case was now brought before t Chancellor, by way of appeal, on b

J. C. Davidson and W. C. Newby, who prayed that the orders of the 12th of February 1847 and the 3rd of March 1847 might be discharged with costs.

Mr. James Parker and *Mr. Torriano*, for the petitioners.—A sufficient return was made to the writ. These parties have never had the custody of the children. The Court had no jurisdiction to make the order afterwards made without a bill had been filed. It could not be done on a petition. The Court has never exercised such a jurisdiction, except through the common law remedy by *habeas corpus*. *Ex parte Hopkins* (1), *Lyons* v. *Blenkin* (2), *Seton on Decrees*, 281.

[The Lord Chancellor.—The Crown, as *parens patriæ*, has jurisdiction over infants, and appoints them a guardian and maintenance. The common law courts have no special jurisdiction over infants. They grant *habeas corpus* as to all persons, not infants in particular.]

No doubt this Court has the same jurisdiction as the common law courts to deliver children into the custody of their parents or out of duress, but to found the jurisdiction they must be made wards of court. Here the children have no property, and no bill is filed. In *De Manneville* v. *De Manneville* (3) a bill had been filed. So in *Butler* v. *Freeman* (4) and *Wright* v. *Naylor* (5).

Mr. Rolt and *Mr. Martindale*, contrà.—This Court will not permit children to be withdrawn from their father's custody and kept concealed, upon no other ground than that from conscientious motives that parent has embraced the Roman Catholic religion. The children are in the constructive custody of these parties. One of them, Davidson, was seen to leave his home in a postchaise some time in the night. He was seen with the mother and the children at the station of the Stockton and Darlington Railway at 8 o'clock a.m. He has been ever since remitting to the mother abroad the dividends of her separate income, and must know her place of residence. Having succeeded in concealing the children, he comes here and defies the Court. As to the jurisdiction, whether the relief is sought by petition or bill, the children are equally wards of court. It is every day practice to appoint a guardian and maintenance on petition. Of what avail would be the jurisdiction to appoint a guardian, if the Court had no jurisdiction to direct a party to give up the custody to that guardian? *Mr. Justice Eyre* v. *Countess of Shaftesbury* (6), *Lady Teynham's case* (7), *Villareal* v. *Mellish* (8). There is no doubt of the jurisdiction, though no cause may be depending. In *Ex parte Bishop* (9) an order was made on Ball, a Roman Catholic priest, who had gone with the children and their mother beyond sea, that he should within four days produce and leave the infants with their guardian or stand committed. In *Ex parte Wright* (10) an infant who had a large property was ordered, on petition, to be delivered up to a next friend by her father and mother, who were persons in low circumstances and of dissolute habits; and the Master was directed to appoint a proper person to have the care of the child. In *Lord Raymond's case* (11) there was no property. What difference is there between a petition and a bill with respect to the jurisdiction? A bill can only be necessary where there are adverse interests to be litigated.

They also cited—

Ex parte the Earl of Ilchester, 7 Ves. 348.
Ex parte Warner, 4 Bro. C.C. 101.
O'Keefe v. *Casey*, 1 Sch. & Lef. 106.
Johnstone v. *Beattie*, 10 Cl. & Fin. 42.
Nicholson v. *Squire*, 16 Ves. 259.

Mr. J. Parker, in reply.—There is no precedent for the Court assuming the jurisdiction except on the application of the infants themselves—*Ex parte Hopkins*. In

(1) 3 P. Wms. 152.
(2) Jac. 245, and note, p. 251.
(3) 10 Ves. 52.
(4) Ambl. 303.
(5) 5 Mad. 77.
(6) 2 P. Wms. 103.
(7) 9 Mod. 40; s.c. 4 Bro. P.C. p. 302, Tomlins' edit.
(8) 2 Swanst. 537.
(9) Reg. Lib. A, 1774, f. 461, 467.
(10) Ibid. B, 1796, f. 228.
(11) Cas. temp. Talbot, 58.

that case Lord King said he could not, on petition, deliver over the children to their father.

[The LORD CHANCELLOR.—There must be some gross inaccuracy in the report of that case. Lord King, according to the report, dismisses the petition, and then makes a special order as to access. Anything which Lord King said I should pay the utmost deference to. I am quite sure he never said this.]

Lady Teynham's case was decided by Lord King in 1724, shortly before *Ex parte Hopkins*. In *Ex parte Bishop* the mother was a Roman Catholic. There was no testamentary guardian. There had been the usual reference as to a guardian. The order against Ball proceeded on this, that he had committed a breach of the previous order of the Court. There was no order originally made as to the custody. In *The Countess of Shaftesbury's case* a bill had been filed. Lord Shaftesbury was a ward of Court.

[The LORD CHANCELLOR.—Is it possible the Court should have power to determine the guardianship, and yet have no power to enforce its own order?]

No doubt the Court has jurisdiction to determine on petition the right to the guardianship, and to direct everything incidental to it; but only at the instance of the infant itself. Here the application is by and on behalf of the father. In *Ex parte Bishop* the petition was presented by the infant.

[The LORD CHANCELLOR.—That is merely the form of the petition. Anybody may present a petition on behalf of an infant. The mode in which the petition is intituled is quite immaterial.]

The case then stood over, at the Lord Chancellor's suggestion, for a further affidavit, to be filed by the petitioners, as to their privity to the abduction and concealment of the children.

May 7.—The LORD CHANCELLOR said, that with regard to the first part of the present application it was not necessary to make any order. There was sufficient cause shewn to induce the Court to issue the writ in the first instance, but the return had been made, and no further proceeding could be taken, for the parties had stated that the ch were not in their custody. As to the of the 3rd of March 1847, it was made two affidavits by Mr. Spence and Du Davidson appeared to have been con with the departure of Mrs. Spence a children from Stockton, inasmuch as l seen with them at the railway statio the apparent intention of proceeding journey. Upon these affidavits th Chancellor made the order upon the who now applied to the Court. The required them to restore the childre the ground that a *primâ facie* cas sufficiently made out that they had p sion of the children. The transactio no doubt, suspicious; the affidavits not answered, and therefore the facts in them were to be taken as admitted true; and as the parties did not con the statement they could not compl the order. As to Newby, there seem reason why he did not state before t was not concerned in the matter. the other party, Davidson, he accom his sister some part of the journey an returned home. That was on the 1 September 1843, and these proceeding now before the Court near September and Spence had been living in the town with Davidson, but had not take proceedings against him before. Wa any reason to satisfy the Court that children were in the care or posses Davidson, so that he had the po restoring them? There was nothing evidence from which the Court coul sume this. The mother was abroa Davidson denied having any powe her. It was, indeed, contended th might exercise some controul over h refusing to remit to her the divide which she was entitled. But the would not be justified in interfering i a manner between those two parti could only interfere to place the child the legal custody. His Lordship s therefore, discharge the order of th Chancellor upon the facts as they we stated; but he thought the order was on the facts as they were represented Vice Chancellor, and therefore he give no costs.

M.R.
March 30, 31;
April 1, 26.

THE ATTORNEY GENERAL *v.* WIMBORNE SCHOOL.

Charity—Rights and Duties of the Ecclesiastical Commissioners—Jurisdiction—Information — Administration of Charity Funds—Statute 3 *&* 4 *Vict. c.* 113.

Previously to the passing of the act 3 *&* 4 *Vict. c.* 113. *an* ex officio *information had been filed by the Attorney General, at the suggestion of the Charity Commissioners for the administration of the property vested in the governors of the revenues, &c. of Wimborne Minster Grammar School. By that act it was enacted (amongst other things) that so much of the property belonging to the collegiate church of Wimborne Minster as should, upon due inquiry, be found legally applicable thereto, should, by the like authority (*i. e. *the ratification of a scheme by the Queen in Council) be applied for the purpose of making a better provision for the cure of souls in the parish of Wimborne Minster. A portion of the property so vested in the governors, who were defendants to the information, was alleged to belong to the collegiate church and to be applicable to the cure of souls within the parish of Wimborne Minster. The Ecclesiastical Commissioners appointed under the act presented a petition in the suit, seeking liberty to attend before the Master under a decree touching the settlement of a scheme for the disposition of the charity funds:—Held, that the Ecclesiastical Commissioners had no special jurisdiction in the charity in question, and could not sustain such a petition, nor could they be deemed to be parties to the suit; but permission was given them to attend the Master at their own costs, the Attorney General consenting thereto.*

Held, that the Ecclesiastical Commissioners acting under the act 3 *&* 4 *Vict. c.* 113. *have no jurisdiction whatever over or in conflict with this or any other Court, nor have they vested in them any such trust as can be recognized in this court; having no estate or interest in the matters in question, the subject of the suit.*

By the act of parliament 3 & 4 Vict. c. 113, intituled 'An act to carry into effect, with certain modifications, the fourth report of the commissioners of ecclesiastical duties and revenues,' it was, by section 64. enacted, "that so much of the property belonging to the collegiate church of Wimborne Minster, in the county of Dorset, as should, upon due inquiry, be found legally applicable thereto, should, by the like authority, be applied to the purpose of making a better provision for the cure of souls in the parish of Wimborne Minster, in the said county." The church of Wimborne Minster was, before the Reformation, a collegiate church, endowed with lands and tithes, and consisting of a dean and four prebendaries, by whom were supported four parish priests and four clerks, to perform divine service in the church, and to discharge the cure of souls in the parish. The Countess of Richmond, during the eleventh year of the reign of King Henry VII., procured letters patent, empowering her or her executors to found a charity in the said church, and her intention was carried into effect by her executors, during the reign of King Henry VIII. The college and charity having been dissolved by the statute of 1 Edw. 6. c. 14, the possessions were seized by the Crown; and, eventually, Queen Elizabeth created the governors of the school into a corporation, and endowed it, with certain reservations, with the possessions which the said church had formerly held. On the surrender of the charter (granted by Queen Elizabeth) in the fourteenth year of the reign of King Charles I., that monarch granted a new charter, and ordered the free grammar school of Wimborne Minster to be opened to all his Majesty's subjects, and to be called the Free Grammar School in Wimborne Minster, and that there should be in the school there for ever one schoolmaster and one usher, and in the church of Wimborne Minster three priests and three clerks to celebrate divine service and the cure of souls of the parishioners there, an organist, four choristers, and four singing boys, and that there should be twelve men of the town and parish to be the governors of the school; and the King conveyed to the governors and their successors for ever certain tithes of corn, grain, and grass therein described; and the governors covenanted that they, at their own charges, would find three proper and honest priests, as ministers, and three clerks, who should continually reside in the said parish, and

continually attend the church in divine service, and administer the sacrament and discharge the cure of souls there, and also four choristers and two singing men, and one organist for celebrating and assisting in divine service; the governors to have power to nominate the schoolmaster and usher, priests, and other officers, and to appoint their salaries, and for reasonable cause to remove them, and to appoint others in their place, so that the removal of the priests, or either of them, should not be without the Bishop of Bristol having been first consulted.

An information having been filed, previously to the passing of the act 3 & 4 Vict. c. 113, by the Attorney General *ex officio*, under the report of the Charity Commissioners, against the governors of the charity and the Bishop of Bristol, an order was made by the Lord Chancellor, on the hearing of an appeal therein, dated the 19th of March 1842, whereby it was (amongst other things) ordered that it should be referred to the Master to settle and approve of some proper scheme for the due administration of the charity and the application of the income thereof, with liberty for the Master to state special circumstances. A scheme was, thereupon, carried in before the Master, which was afterwards amended, proposing to provide for the government of the grammar school and the general administration of the charity; and thereby a sum of 250*l.* was proposed to be paid to each of the three clergymen, which sum, as respected the clergyman at Holt, was proposed to be subject to a reduction of 25*l.* on his having a residence assigned to him. By the same scheme it was also proposed that should any surplus exist, after making the several payments comprised in a schedule annexed thereto, such surplus should be divided into thirds, and two-thirds thereof should be applied in increase of the salary of the head master, and the remaining third in increase of the salary of the under master. The petitioners, as stated by the petition, had very recently only become acquainted with the proceedings which had been instituted in the cause and the proposed scheme, and were desirous of obtaining the sanction of the Court to appear and be heard before the Master, upon the scheme so brought in by the Attorney General, and of submitting to the consideration of the Mas views in respect of the proportio property vested in the governor ought to be applied as a provisio cure of souls within the parish borne Minster, and of the applicatio when ascertained, and also in respe duties to be performed by the pers ing the cure of souls within tha The petition, after statements to th said effect, prayed that the petitio Ecclesiastical Commissioners, migl liberty to attend the Master forthw to be heard from time to time, themselves, their counsel, solici agents, before the Master, touc scheme, and on the matters referre by the order of the 19th of March far as related to ascertaining and fi proportion of the property vested governors, which ought to be appl provision for the cure of souls wi parish of Wimborne Minster, and related to the application thereo ascertained; and also in respect duties to be performed by the pers ing the cure of souls within that pa that the Master might be at liberty hold his approval of the said scheme, and his allowance there after the petitioners should have be before him, and that the petitione have liberty, if necessary, to car scheme, in respect of the matters a before the Master.

Mr. Turner and *Mr. Fleming*, in of the petition, referred to the 64th sections of the act already mentio contended that the proposed schem violation of the act; that origin amount of income given to the cl was threefold that given to the sch ter; that the sole object of the pe was to see that the charity funds w and properly applied, and they oug parties to the information, the pet so far as they were interested in the souls of the parish, not being in a ner represented before the Master.

[The MASTER OF THE ROLLS.—] a loss to know why the Attorney should not call the attention of the to the subject-matter of the presen cation, who may say, in the cours proceedings before him, I must ha

one before me to represent the Church; but the petition before me claims a right, in the first instance, on behalf of the Ecclesiastical Commissioners, to attend the Master in his consideration of the scheme.]

Mr. Turner did not object that the costs of the present application should be reserved, inasmuch as a party might possibly make an improper use of the order sought from the Court if granted.

Mr. Blunt, for the Attorney General, suggested to the Court that the petitioners should have made an application to the Attorney General before they presented the present petition, and have satisfied the Attorney General, if they could, of the existence of any conflicting interests.

Mr. Kindersley and *Mr. Willcock*, for the governors of the school, contended that the present petition was quite unnecessary, inasmuch as the three clergymen who were interested in the funds had, on special application to the Court, been allowed to attend the proceedings before the Master at their own expense; that the Charity Commissioners themselves might quite as properly ask for leave to appear before the Master, under the decree, as the present petitioners; that the sole duty of the Ecclesiastical Commissioners was to prefer and lay a scheme before her Majesty in council, and having done that, their power was exhausted; that as soon as it was ascertained what portion of the funds belonged to the church, the same would no doubt be claimed by the Ecclesiastical Commissioners; that the three clergymen who attended the Master, and who were, to some extent at least, under the influence of the petitioners, would attend to any suggestions that fell from the petitioners; and that to grant the present application would be to establish a precedent that might prove very injurious to the charity property.

Mr. Turner, in reply, referred to the 84th and divers other sections of the act of 3 & 4 Vict. c. 113.

[The Master of the Rolls.—Have the Ecclesiastical Commissioners a right to inquire into cases where there is a chance of an interest coming to them?]

Mr. Turner.—The scheme of the Ecclesiastical Commissioners is directed by the act to be laid before the Queen in council, with a view to carry the act into full effect, and of which notice is required to be given to any corporation, aggregate or sole, to be affected thereby. By the expression "by the like authority," contained in section 63. of the act, was meant the order of the Queen in council, made under the suggestion of the Ecclesiastical Commissioners. If no information had been filed, and the act of parliament, 3 & 4 Vict. c. 113. had been in existence, the Ecclesiastical Commissioners might have filed an information at their own relation, to ascertain the amount of the funds legally applicable to the cure of souls. If trustees have the application of funds, and an information is filed by the Attorney General, and new trustees are appointed under the original instrument constituting the trust, the new trustees must be made parties by the Attorney General in a suit for the administration of the funds; and such in reality is the present case. The 57th, 58th, 68th, and other sections of the act 3 & 4 Vict. c. 113. were also referred to on behalf of the petitioners in the course of the argument.

The Master of the Rolls, after observing (amongst other things) that he could not at present conceive any better right in the petitioners to appear before the Master, under the decree made in the information, than the Charity Commissioners themselves would have, said he would, owing to the great respect he entertained for the Ecclesiastical Commissioners, reserve his decision until a future day.

The Master of the Rolls.—This petition is presented on an information filed by the Attorney General on the suggestion of the Charity Commissioners, and the information seeks the administration under the direction of this Court of the estates and property vested in the governors of the possessions, revenues, and goods of the grammar school of Queen Elizabeth, of Wimborne Minster, in the county of Dorset. The governors are incorporated by royal charter, and they are to provide not only a schoolmaster and usher for the school, but also three priests and three clerks to celebrate divine service, administer the sacraments, and discharge the cure of souls of the parish; there are, besides that, four choristers, two singing men, and an organist; and they have the authority, with the ad-

vice of the Bishop of Bristol, to make ordinances, and are to support and maintain the chancel of the church. By the decree in the cause it was referred to the Master to settle and approve of a scheme for the due administration of the charity, and the application of the income thereof, with liberty to state special circumstances. In the consideration of the scheme, the Master may have to consider what proportion of the revenues ought to be applied to the schoolmaster, usher, and school, and what proportion to the priests and clerks, and the spiritual duties they may have to discharge, and how the proportion of the revenues applicable to the school and the spiritual duties respectively ought to be applied.

It appears that the Attorney General has laid before the Master a scheme, of which the Ecclesiastical Commissioners for England have heard, and of which they do not approve. The Master has expressed no opinion on the scheme, and may not approve of it. The Ecclesiastical Commissioners have not thought proper to communicate with the Attorney General on the subject, but they have presented this petition praying that they may be at liberty to attend before the Master touching this scheme, and on the matters referred to the Master, by the decree, so far as relates to ascertaining and fixing the proportion of the property vested in the governors, which ought to be applied under the provision for the cure of souls, within the parish of Wimborne Minster, and so far as relates to the application thereof when ascertained, and so far as respects the duties to be performed by the persons intrusted with the cure of souls within the said parish. The Ecclesiastical Commissioners for England were first constituted and incorporated in the year 1836: they were empowered to make certain inquiries, to examine witnesses, and to require the production of documents; and it was made their duty to prepare and lay before his Majesty in council such schemes as appeared to them best adapted for carrying into effect the recommendations therein recited; and power was given to her Majesty in council to issue orders to ratify such scheme, and to direct every such order to be registered; and it was enacted, that every such order should be published and inserted in the *London Gazette*, and that as soon as any such order in council should be so registered and published, it should have the same force and effect as if the same were included in the act.

In the year 1840 various ecclesiastical revenues, estates, and interests were directed to be paid to and vested in the Commissioners for the purposes of that act; they were enabled to enforce payment and obtain possession of such revenues and estates in the manner by the act directed; and except as to certain specified payments, they were directed to carry their receipts to a common fund, which was to be applied in the manner by the act directed. By the same act additional Commissioners were appointed, and they were directed from time to time to propose and lay before her Majesty in council such schemes as should appear to them best adapted for carrying that act into full effect, and in such schemes to recommend such measures as might on further inquiry, which they were authorized to make, appear to them to be necessary for that purpose; and it was made lawful for her Majesty in council to make orders for ratifying the schemes of the Commissioners; and every such order, when ratified, was in all respects, and as to all things therein contained, to have and be of the same force and effect as if all and every part thereof were included in the act. The act contained this special clause: "And be it enacted, that so much of the property belonging to the collegiate church of Wimborne Minster, in the county of Dorset, as shall, upon due inquiry, be found legally applicable thereto, shall, by the like authority, be applied to the purpose of making a better provision for the cure of souls in the parish of Wimborne Minster, in the said county." It was assumed in the argument, and may, I suppose, for the present purpose be taken for granted, that the property mentioned in this clause of the act of parliament is the same property which is the subject of the information, and which the Court is by the information required to administer upon the trusts of the foundation of this charity. It is not alleged that the property, or any part of it, or any income or emolument arising from it, is vested in, or directed to be paid to, or placed under

the controul of the Commissioners. The Commissioners may have a duty imposed on them, as all official persons have or ought to have. If the expression be preferred, they may be said to have the performance of an important duty intrusted to them; but the duty does not arise in respect of any property or estate vested in them; and I apprehend that in the contemplation of this Court, they have neither estate nor interest, and are neither trustees nor *cestuis que trust*. Under these circumstances, it appears to me that this petition, by which the Ecclesiastical Commissioners for England claim, in effect, a right to be litigant parties in the cause in which the charity fund is to be distributed, is not to be entertained. But in the matter of a charity the Court may truly be said to be anxious to profit by the advice and assistance of any competent persons; and the position and the means of knowledge which are possessed by the Ecclesiastical Commissioners for England are such as to make it very probable that their advice and assistance might be extremely valuable. There can be no indisposition to give due attention to any suggestion which they may offer; and both the Attorney General and the trustees or governors of the charity have offered to consent to an order by which the Commissioners may have liberty to attend, and be heard before the Master at their own expense. This offer, which I own appears to me extremely reasonable, seemed for a moment likely to be accepted, but in the end it was rejected; and I was informed that the Commissioners considered it to be their duty to the public to insist on their right to be parties to the information, offering, indeed, to waive that, if they were permitted to attend as if they were parties, and to be treated as such in respect to costs, and held not liable to pay any of the costs or expenses which they might occasion, unless they should, in their attendance, make themselves liable to pay the same by some misconduct. The question, therefore, is not a question of mere expediency or discretion—whether in the consideration of the scheme it would be desirable to have the advice and assistance of the Ecclesiastical Commissioners, or whether the Attorney General, in proposing his scheme, should act in concert with them, or form his own scheme after consideration of their suggestions; but the Commissioners have thought fit, and now think fit, to make it a question of right, and to insist that they are entitled not merely to the assistance of the Attorney General, but if they think fit, to litigate with him in this court, and to oppose his scheme without any previous communication with him on the subject.

The argument in support of the petition varied in its progress. At first, I was told, that the act of parliament gave to the Commissioners a special jurisdiction in this particular charity; that no decree or order of this Court could in any way affect that jurisdiction, or bind the Commissioners, in whom it was vested; but whether they were absent or present, attended to or not, they could frame their own scheme wholly independent of any scheme confirmed by this Court, by the Lord Chancellor, or by the House of Lords. It is, however, obvious, that the Commissioners have not of themselves any power to make any order or establish any scheme whatever in this or in any other matter. When they have prepared and laid a scheme before her Majesty in council, their power is exhausted: it does not depend on them whether the scheme shall be ratified or not; and this being obvious, the argument was varied, and was, that the Queen in council, on the suggestion of the Commissioners, had a special jurisdiction; that the decree or order of this Court, whenever confirmed, could not bind her Majesty in council; and that under this act of parliament her Majesty in council, on the suggestion of the Commissioners, might make an order, the effect of which would be to annul and supersede the order of this Court, though confirmed by the highest judicial authority in the kingdom. The argument was said to be used not for the purpose of shewing that any such controversy or conflict of jurisdiction would in fact, or might probably arise, but for the purpose of respectfully suggesting to this Court the danger which there was of the possible conflict of jurisdiction if the proceedings under the decree should take place in the absence of the Ecclesiastical Commissioners for England. What power might be possessed by her Majesty in council under this act of parliament, may, if necessary, be argued by the Attorney General on a

proper occasion, when it may be duly considered and determined. In my opinion, it is not proper to be argued by the Ecclesiastical Commissioners for England, or to be determined on this or any such petition of theirs; and the language repeatedly used in the course of the argument makes it my duty to state, in my opinion at least, that the Commissioners have no jurisdiction whatever over, or in conflict with, this or any other court. They have to inquire on a most important subject, and it is their duty to prepare schemes and to lay them before her Majesty in council. I do not suspect that in the preparation of their schemes they will feel, even in the least degree, disposed to act in contradiction to the law as laid down by this or any other Court; and when their schemes are brought under the consideration of her Majesty in council, I have not the slightest apprehension that her Majesty in council will ratify any scheme, or do any act to impugn or supersede the scheme legally approved of by this Court in the regular exercise of its established jurisdiction, or take any such mode of correcting, or affecting to correct, any error or irregularity which may have occurred in the proceedings of any subordinate branch of this Court; and I confess that I am much at a loss to understand why it is that the petitioners claim and insist on the right they now propose. It seems that pending the inquiry respecting this charity before the Charity Commissioners, the Ecclesiastical Commissioners for England were informed that there might be some surplus probably of the funds belonging to the collegiate church of the parish of Wimborne Minster, after answering the purposes of the charity, and thereupon they recommend that so much of the property belonging to the collegiate church of Wimborne Minster as should be found to remain, after providing for the original purposes of the foundation, should be applied to the purposes of making a better provision for the spiritual care of the parish of Wimborne Minster. This report is said to have been made in June 1836; the information was filed in the following month of November by the Attorney General, not at the relation of the Ecclesiastical Commissioners for England, but *ex officio*, at the suggestion of the Charity Commissioners. The subject was duly under the jurisdiction and direction of this Court at the time when the statute of the 3 & 4 Vict. c. 113. was passed.

It was said at the bar that the bill by which the act was proposed did not, at first, nor until it reached its last stage, contain any provision relating to Wimborne Minster. The pendency of the suit might have been a reason for excluding it; but I do not enter into that subject, which, though very important in one view, does not appear to me to be material for this purpose. The act of parliament does now contain the clause on which the petitioners rely; and the question is, whether on the construction of it the Commissioners have a right to be litigating parties in this cause. On reading the clause, I do not think that the inquiry directed by this Court in the exercise of its ordinary jurisdiction on an information duly filed by the Attorney General, can be otherwise than included in the expression "so much as shall, on due inquiry, be found to be *legally applicable* to the purposes in the act mentioned." It could not be meant, nor are there any words implying that it was meant, to invest the Ecclesiastical Commissioners with jurisdiction and authority to determine or find what was, or was not, legally applicable to the purpose; and although the purpose, obscurely as it is expressed, probably means the purpose of making better provision for the cure of souls in the parish of Wimborne Minster, I think that the consideration or the determination of how much is legally applicable to that purpose, which involves the question of how much is legally applicable to the other purposes of the charity, does not depend on any judgment, act, report, or opinion of the Ecclesiastical Commissioners for England, but must depend on the determination of this Court, founded on a due consideration of the true effect and meaning of the instrument constituting the foundation and endowment of the charity, according to the principles and authorities by which this Court is governed in such cases. The clause further enacts, that what "shall be found legally applicable thereto shall by *the like authority*, be applied to the purpose of making a better provision for the cure of souls." What is meant by "the *like authority*," thus vaguely referred to by a relative word, without a proper an-

distinct antecedent? Not the authority of the Commissioners, as was urged in one part of the argument; but, probably, the authority or order of the Queen in council, suggested in a scheme, prepared and laid before her Majesty by the Commissioners, as was contended for afterwards; and if this be right, the result seems to be, that the Queen in council, on the suggestion of the Ecclesiastical Commissioners for England, may, so far, under like authority, as is applicable, properly and legally apply so much of the property as on due inquiry shall be found legally applicable to the cure of souls. Having regard to the legal and regular means of correcting any error which may be made in this court, we are not to suppose any other than a just and legal exercise of the authority of this Court; and I think, that if this Court, in the just and legal exercise of its authority, were to ascertain that according to the true meaning and effect of the foundation and endowment a certain portion of the fund ought to be applied for spiritual purposes, even in a particular manner, there is nothing in this act to entitle the Ecclesiastical Commissioners, or the Queen in council, to prepare and ratify a different scheme, that is, a scheme inconsistent with the true meaning and effect of the foundation and endowment; and I am of opinion that this Court is not at liberty to withhold the exercise of its proper jurisdiction and authority, or to abstain from the exercise of that jurisdiction and authority, in the absence or without the permission of the Ecclesiastical Commissioners, in the vain imagination that the authority of the Queen in council may be exercised in such a manner as not to ratify and give the force of law to a legal decree of this Court,—a decree made legally, and in conformity with the trusts of the foundation. I am well satisfied that no such authority will be exercised by the Queen in council; and I am far from thinking that the Ecclesiastical Commissioners will ever think of proposing that any such authority should be exercised. I believe that, on consideration, they will be rather disposed to assist than to counteract the due administration of the law, and the legal application of this charity estate. The act of parliament containing this clause in relation to Wimborne Minster, it was quite reasonable and proper that the Ecclesiastical Commissioners for England should give their attention to the subject; they might most reasonably have suggested to the Attorney General that the act imposed on them, or at any rate might be held to impose, or did impose, a duty on them, and might have requested the Attorney General to consider the case, and afford them any assistance which might be useful to them in the performance of that duty, and if necessary to bring the subject under the consideration of the Master and of this Court. If they had done this they would probably have met with respectful and willing attention. If they had not met with the willing attention which they were entitled to from the Attorney General, I think that the means of setting that matter right would be open to them; but, instead of asking the assistance of the Attorney General, they have, on this occasion, claimed a right to be heard, independently of the Attorney General, separate from and against him, on the scheme which he proposes. When the Attorney General offers to consent to their appearing at their own expense, by which their assistance may be obtained, they reject the offer, and still insist on their right. It may be admitted that they have a duty, and a very important duty, to perform under the act. They have a political, and an ecclesiastical duty; they may have a right to the assistance of the Attorney General, but they have not, I think, vested in them any such trust as can be recognized or administered in this court; they have no estate and no interest in the matters in question; and I am of opinion that they have no right to be treated as independent parties in this cause, or to appear as such. In this case we have already, as parties to the cause, the Attorney General, whose duty it is to attend to all public interests involved in the case—the governors, whose duty it is to state to the Court everything necessary for the protection of the property, and its due application; we have further, the Bishop of Bristol, who is said to be the visitor of the charity; and the Master is attended by three clergymen, who are interested to increase the amount of revenue applicable to the cure of souls; besides the choristers, singing-boys, and organist. Believing as I do that the Ecclesiastical Com-

missioners are very competent to give useful assistance in the settlement of the scheme, I should be glad to have the benefit of it, if they would give it without burthening the charity with increased expense; but advancing their claim as they do, as a right, I am bound to say, that I think they have no right to interfere at the expense of the charity. I have no doubt that, on the consideration of any scheme, the Attorney General will not omit to notice the clause in the act of parliament, which refers to Wimborne Minster; and I am sanguine enough to hope that even without the assistance of the Ecclesiastical Commissioners, or their solicitor, we may be able to proceed without violating the law, or coming into conflict with any order made by her Majesty in council. The Commissioners will probably admit that the exercise of their proper functions is not to bring them into conflict with her Majesty's courts of justice. If they think fit to accept the offer made to them, I shall most willingly comply with it, and give it the sanction of this Court; but, if not, I must dismiss this petition with costs.

WIGRAM, V.C. April 21. L.C. May 22. — FISHER *v.* FISHER.

Witness—Evidence—Insolvent Plaintiff, Examination of, by Co-plaintiff, as Witness.

A suit having become defective by the insolvency of a sole plaintiff who had obtained a protecting order under the 7 & 8 Vict. c. 96, his assignees adopted the suit and filed a supplemental bill. An answer was put in, not disputing the insolvency, replication was filed, and issue joined. The assignees then moved for leave to examine the insolvent plaintiff in the original suit as a witness in the cause. Motion refused.

The plaintiff and the defendant in the original suit were both solicitors, and the bill sought to obtain an account of costs received by the defendant in certain causes in this court, on the ground that the parties for whom the defendant had acted as solicitors were clients of the plaintiff, and that the defendant had acted in such causes as the agent of the plaintiff. The su become defective by the insolven sole plaintiff, his assignees adopte and filed a supplemental bill. Tl was put in, not disputing the in replication was filed and issue joir

The assignees now moved for examine the insolvent, who had o protecting order under the 7 & 8 V as a witness in the cause.

Mr. James Russell and *Mr. S.* the motion, contended that the was no longer a party to the interested in the result, all his int liabilities having passed to his and therefore his evidence was ad but that a special application to was necessary—

Motteux v. *Mackreth*, 1 Ves.
Benson v. *Chester*, Jac. 577.
Armiter v. *Swanton*, 1 Amb. 3
Troughton v. *Getley*, 1 Dick. 3
Ewer v. *Atkinson*, 2 Cox, 393
Hewatson v. *Tookey*, 2 Dick.
Edwards v. *Goodwin*, 10 Sim.
Lord Huntingtower v. *Sherborn* 380; s. c. 12 Law J. Re Chanc. 20.

Mr. Bagshawe, contrà.—It is that an insolvent plaintiff is not costs; and in that respect the in still a party to the suit. If, howe no longer a party to the suit, then cial application in this case is unne

WIGRAM, V.C.—It is manifest assignees, though at liberty to do not bound to adopt the insolve They might have instituted an orig and have examined the bankrupt ness, saving just exceptions. Bu thought proper to adopt the suit, t take the consequences; and the qu whether the exclusion of the in evidence is a consequence of their of the suit. The question is, wh insolvent, upon the pleadings, is purpose a party. If he is, he c examined. If he is not, he is a g ness for the assignees in the supp suit. First, then, is he a party he be liable for costs? The pr settled, that if a sole plaintiff becom rupt, and his assignees do not a

it, the defendant may dismiss the bill, ut without costs—*Lord Huntingtower* v. *Sherborn;* and it has been admitted by the defendant's counsel that the insolvent does not remain a party on the record as to any demand in the cause. Next, as to his interest in the result of the suit. All his nterest and liabilities have been transferred o his assignees. Then, does he remain a ormal party to the suit? That his name nust remain in the original suit was admitted, but that does not appear to answer he question. The original cause was instituted by and in the name of the insolvent, nd his name would still be used therein s a means of describing the suit: but the uestion is, whether the original suit is not erged in the supplemental suit, and the solvent as completely discharged as if the signées had filed an original bill. Alough, for the purpose of describing the iginal suit, the name of the bankrupt ust be still used, he is not served with ny proceeding in the cause; nor, in case f his death, would his personal representaves be necessary parties to any future roceedings. My conclusion, in the absence f authority upon the point, would be, that he insolvent had ceased to be a party, and hat the assignees have, in truth, suppressed he proceedings in the original suit, and hat nothing now remains but the supplemental suit. I do not mean to go beyond the case before me, or to say what the decision might be in the possible case of the bankruptcy being disputed. The question is, how far the case is affected by the decisions in *Hewatson* v. *Tookey* and *Ewer* v. *Atkinson*. In the former of those cases Sir Lloyd Kenyon made an order similar to the one now asked, which the Lord Chancellor discharged; and I cannot but think, on reading that case, that the Lord Chancellor did so on the ground suggested by Mr. Dickens, that the bankrupt remained a party not in name only, but a party liable for costs. In *Ewer* v. *Atkinson*, three partners filed a bill, and the three afterwards became bankrupt; and the assignees applied for leave to examine one of the bankrupts as a witness. The Master of the Rolls ordered the original bill to be amended by striking out the name of the bankrupt as a plaintiff, and then to examine him as a witness *de bene esse*. The Master of the Rolls thought that the regular course. I cannot think that the right to examine a witness depends upon the question whether he is a sole plaintiff or a party is joined with him as co-plaintiff. If, however, the plaintiffs were to amend the bill in this case, by striking out the name of the plaintiff, there would be no cause in existence. It was said for the defendant, that if the bankrupt were not a party, a special application was unnecessary. If I were at liberty to act upon my own opinion I should at once make the order asked. It is quite ground enough to shew the necessity of a special application, that no case has occurred in which the order has been made, though the case is one of common occurrence. The proper course, however, is not to make the order as asked; as by so doing I should be opposing the Lord Chancellor's order in *Hewatson* v. *Tookey*, and also that of the Master of the Rolls in *Ewer* v. *Atkinson;* but I should recommend an application to the Lord Chancellor.

The assignees renewed the application by way of appeal before the Lord Chancellor.

Mr. J. Russell and *Mr. S. Smith*, for the motion, cited—

Goss v. *Tracy*, 1 P. Wms. 288.
The Mayor and Aldermen of Colchester v. ——, Ibid. 596.
Haws v. *Hand*, 2 Atk. 615.

The Lord Chancellor.—The only point I have to consider is, what is the practice of the Court, and not whether some other mode of proceeding might not be more convenient. I have to consider whether the practice of the Court is now different from what it was in the time of Lord Eldon. The new practice which is founded upon Lord Denman's Act (1) has nothing to do with the case. That act applies to cases of interest; but the objection here is not on the ground of interest, but because the party who is proposed to be examined is a co-plaintiff. I wanted a case of a plaintiff being examined by a co-plaintiff; but the argument has closed without any such case being produced. In *Goss* v. *Tracy* a party was examined as a witness who was no party to the record when he was examined, but afterwards became a party to the record;

(1) 6 & 7 Vict. c. 85.

that accident would not affect his depositions taken when he had no such interest. There is, therefore, no case in which a plaintiff has been permitted to be examined by one of his co-plaintiffs. If a party files a bill and then becomes insolvent, is he, according to the practice of this Court, still to be considered as a plaintiff on the record, so as to be open to objection as a witness upon that ground?

Now, this was settled as long ago as 1785. The effect of a certificate is more in favour of his admissibility than the protection under the Insolvent Act; but in the case referred to of *Hewatson* v. *Tookey*, Sir Lloyd Kenyon made an order permitting the plaintiffs to examine a bankrupt co-plaintiff. It came afterwards before Lord Thurlow, who refused the application.—[His Lordship read from the Report, 2 *Dick.* p. 800.] It was not treated by Lord Thurlow as a new question, but he considered all rule and principle was against the application; and that it was clearly established that a co-plaintiff could not be examined. Much may be said against the accuracy of cases in *Dickens;* but there were many cases in which he personally investigated what was the practice, and these are of very considerable value, because they shew the result of his inquiries. He doubted whether Sir Lloyd Kenyon was right in his decision, and brought it under the consideration of Lord Thurlow; and Lord Thurlow refused the application because he thought it against all rule and principle. Since that time no case has been produced of a similar application; but a subsequent case of *Ewer* v. *Atkinson* (2) has been produced before the same Judge, who then seemed to have taken a very different view of the practice of the Court. The order made in that case was to strike the bankrupt out of the record as plaintiff, in order that he might be examined as a witness. It shewed that the view of the Court was, that so long as he remained a party on the record as plaintiff, he could not be examined on the part of the assignees. There is, therefore, the decision of Lord Thurlow, and of Lord Kenyon altering his former opinion; and I am now asked to alter the practice which has been established for sixty years. If that is done, it must be done by some general rule. I refuse this motion, because I find it contrary to the practice of the Court, and because Lord Denman's Act has no application, as there is no question of interest; and I must refuse it with costs.

(2) 2 Cox, 393.

M.R.
April 20, 21. } RICHARDSON *v.* HASTINGS.

Parties—Pleading—Account—Dissolution of Partnership—Prayer for Limited Relief.

In the year 1837 *a club was established. Its furniture, in the first instance, was hired, but afterwards, by means of voluntary contributions from divers of the members of the club, purchased. Shortly afterwards the club, by reason of the insufficiency of its income arising from the subscriptions and admission-fees of the members, became embarrassed, and a deed was executed, to which H, E, and S, three of the directors of the club, divers other members of the club, some of its creditors, and R. (also a member), were parties, by which R. was constituted a trustee for the sale of the furniture and other effects of the club, for the purpose of distributing the proceeds in manner therein directed. Afterwards, a special general meeting, duly convened, was held, of the members of the club, at which it was resolved, that the club was from that date dissolved; and eleven members of the club were, by a resolution at the meeting, at which R. was present, appointed to wind up the affairs of the club. H. and E, two of the most active of the eleven members, accordingly sold the furniture and effects of the club, and out of the proceeds paid the debts provided for by the trust deed, but only partially satisfied other debts of the club, it being alleged by H. and E. that the payments that had been made by them had exhausted the proceeds of the sale, and tha there was nothing to return to the member in respect of the contributions:—A bi being filed by R, on behalf of himself and other members of the club, except the defe dants, against H. and E, two of the directo and also against W, one of the ordin members of the late club, and not a direc seeking an account of the receipts and*

ments of H. and E, and payment of the balance to the plaintiff as the trustee thereof, or as the Court should direct, but not asking that the affairs of the club might be wound up, —it was held, that R. was entitled to a decree for an account against H. and E; and that the Court would, in case a balance should be found due from the defendants after taking the accounts before the Master, devise a mode of distributing the same amongst the parties entitled.

Wallworth *v.* Holt, 4 Myl. & Cr. 619, *c.* 10 Law J. Rep. (N.S.) Chanc. 138, *and* Upperly v. Page, *ante*, pp. 100 & 302, *followed.*

For the decisions in this case, on the two demurrers that were filed by the defendants Emly and Hastings, and the frame of the bill, *vide* 13 Law J. Rep. (N.S.) Chanc. pp. 129 and 142.

The object of the bill, which was filed by the plaintiff on behalf of himself and all the other members of the Alliance Club, was to have an account rendered by the defendants Hastings and Emly of the produce of certain furniture and other effects belonging to the club, and of monies received by them in respect of the sale of wines, books, and other property of the club, or by way of contribution from the plaintiff and other members of the club, and payment of the amount due to the plaintiff as the trustee named in a deed dated the 27th of January 1838, or otherwise, as the Court should direct. The club was established in the month of February 1837, and for the purposes of it a lease of a house and premises situate in Pall Mall was granted to the defendant Hastings and Charles Stewart and Robert Tubbs, as trustees for the club. The furniture of the club was, in the first instance, hired. In consequence of the limited number of persons who joined the club, the entrance fees and annual subscriptions of the members proved insufficient for its proper support, and, in consequence, the pecuniary affairs of the club became embarrassed shortly after its establishment. A special general meeting of the members of the club having been convened by the defendant Emly, and Tubbs and Stewart, all members of the committee, the same was held on the 5th of January 1838, when certain resolutions were passed relative to the management and conduct of the club; and it was resolved, amongst other things, that it was advisable to raise, by way of loan, about 3,000*l.* to enable the committee to purchase all the furniture and other things requisite for the club; and it was subsequently agreed that the furniture to be purchased, and other articles and things thus mentioned, should be vested in the plaintiff upon the trusts declared by an indenture dated the 27th of January 1838, made between Hastings, Emly, and Stewart, of the first part, divers other members of the club of the second part, John Peachy of the third part, Messrs. Hopkinson & Co., the bankers of the club, of the fourth part, and the plaintiff of the fifth part, being trusts for sale in case default should be made in payment of 400*l.* and interest to the bankers, and out of the proceeds of the sale to pay that sum and interest, and in the next place to pay thereout, *pari passu*, the several persons parties thereto of the first and second parts and John Peachy respectively the sums due to them. That deed was settled by the defendant Emly, and he and Hastings, together with the plaintiff and twenty-one other members of the club, executed it. Several other members of the club, besides those who executed the deed, subscribed to the fund (the plaintiff having subscribed 50*l.*); and the subscriptions to the fund, varying in amount, made, in the aggregate, 805*l.* Tubbs having retired from the club, a new lease was granted of the club-house to Hastings, Emly, and Stewart, for a term, commencing on the 25th of March 1838, at the annual rent of 450*l.* The furniture was paid for out of the monies subscribed. The embarrassments of the club having increased, a special general meeting of the members of the club was called for the 10th of May 1839, when divers resolutions were passed, by which the club was declared dissolved. Directions were given for the sale of the furniture and other effects of the club, and arrangements were ordered to be entered into for the sale of the lease of the club-house, and eleven members were appointed to wind up the affairs of the club. Shortly after the last-mentioned meeting, and in pursuance of a resolution passed thereat that each member should pay the sum of 13*l.* to be applied in payment of the debts of the club, the plaintiff

and sixty-seven other members paid 13*l.* each, amounting altogether to 884*l.*, to the bankers of the club. The furniture and effects of the club were sold by Hastings and Emly for 1,700*l.* and upwards; 1,200*l.*, part thereof, was received by them, and a receipt for that sum, dated the 14th of August 1839, was signed by Hastings, Emly, and Dobson, all members of the committee. The club-house was surrendered to the lessor. In the month of December 1839, Stewart gave notice to the bankers of the club (Messrs. Hopkinson & Co., who had been appointed its bankers by a resolution duly passed at a general meeting on the formation of the club) not to pay any cheques that might be drawn upon them on account of the late club, without previously obtaining his sanction for doing so. Messrs. Hopkinson & Co., however, on receiving an indemnity from Hastings and Emly, still continued to honour the cheques of Hastings and Emly, and another member of the committee, and in June 1840 they closed the club accounts with those gentlemen, and opened a new club account with Messrs. Praed & Co., who were the private bankers of Hastings, and monies were paid into that bank on account of the defendants. Hastings and Emly, out of the monies that came to their hands, paid some of the club debts in full, portions only of other club debts, and refused payment altogether to Messrs. Todd and Bosanquet, and other creditors of the club. The former brought an action against Hastings and Emly for recovery of a sum alleged to be due to them for wine supplied to the club, which was tried five times. The plaintiff and his partners were the attornies for the several creditors who brought their actions against the defendants for recovery of the amounts due from the club. The defendants insisted that no part of the club property remained in their hands, and Hastings insisted that he had actually paid 50*l.* out of his own pocket towards the liquidation of the demands against the club. The former bankers and Peachy having been paid all that was due to them under the indenture of the 27th of January 1838, the only *cestuis que trust* unsatisfied were those members of the club, thirty-eight in number, who contributed the various sums as voluntary loans, for the purpose of purchasing the furniture for the use of the club on its formation. The only other defendant, Welch, was a member of the club at the date of its dissolution, but was not a member of the committee.

The plaintiff did not enter into any evidence in support of his case, but read divers passages from the answer of the defendants Emly and Hastings.

On the part of those defendants, evidence at considerable length was entered into to prove the process that had been taken with reference to the dissolution of the club, and the meetings held touching the same, and the transactions connected with the disposition of the furniture and effects of the club, and the proceedings in the several actions at law against the club instituted by its creditors.

Mr. Kindersley, *Mr. Turner*, and *Mr. Tripp*, for the plaintiff, contended that the Court would authorize a bill like the present to be filed for the benefit of a partnership where each party was represented. The plaintiff was clearly entitled to an account of the monies of the club that had been received by the defendants Hastings and Emly. *Franco* v. *Franco* (1) was cited for the plaintiff.

Mr. Purvis and *Mr. Hubback* for the defendants Hastings and Emly.—The plaintiff, after the dissolution of the club, in which he was a party assisting, ceased to be the trustee under the deed of the 27th of January 1838, the resolutions passed on the 10th of May 1839, and subsequently thereto, being inconsistent with that deed, and the trusts therein contained. And even if the plaintiff is to be considered a trustee, still he ought to make the other members of the committee (eight in number) parties, they insisting that the monies of the club have been duly appropriated. Again, of the eleven members appointed to wind up the concerns of the club, two only are parties to the suit; and the call of the 13*l.* contribution from each member of the club (no part of which came into Hastings and Emly's hands), negatives the right of any member to claim any interest in the alleged surplus. The plaintiff's equity consists of the alleged refusal of Hastings and Emly to render the accounts sought of them by the plaintiff: but the funds, even if forthcoming, do not

(1) 3 Ves. 75.

belong to the plaintiff any more than to any other member of the club who subscribed to the purchase of the furniture. The plaintiff does not desire to have the outstanding claims against the club settled, but Hastings and Emly do; and if they are to be settled, there must, necessarily, be a contribution amongst the late members, the affairs of the club having been actually wound up. After dissolution of a co-partnership, the partners have a right to insist that the whole of the partnership property shall be applied in satisfaction of its debts: and if any one partner has paid more than he ought to have paid, he is entitled to demand contribution from his late co-partners who have paid less; but they must be parties to any suit instituted for contribution. To allow the plaintiff to receive the unapplied partnership funds, as he prays by his bill, would be doing injustice to the other subscribers to the furniture fund, and more especially so in their absence. And even if the Court were to direct an account to be taken of the receipts and payments by the defendants Hastings and Emly in respect of the partnership assets, what practical benefit could be worked out by such a course, where the estate, as in the present case, is an insolvent one, and the defendants Hastings and Emly have, confessedly, paid more than their just share of the contribution would amount to? At all events, the plaintiff, who claims a debt due to him adversely to the interests of other members, cannot succeed without having the parties immediately interested before the Court. Even if the balance (should any balance be forthcoming on taking the accounts) were to be ordered to be paid into court, another bill will be necessary, with a view to the disposal thereof, no administration being sought by the plaintiff of the funds of the partnership; nor is it asked by the plaintiff to place the funds under the controul of the governing body of the late club.

Mr. Hooper appeared for the defendant Welch, and asked to be dismissed, with costs, as he disclaimed all interest in the subject-matter of the suit.

Mr. Kindersley, in reply, after stating that the members who made the 50*l.* contributions did not do so on any understanding that they should be repaid any part thereof, and therefore were not necessary parties, and that the plaintiff did not seek to deal in any way with the partnership monies, but only to bring them back into a common fund, referred to the case of *Apperly* v. *Page* (2), before Knight Bruce, V.C., and the Lord Chancellor on appeal, and made some observations on the cases of *Wallworth* v. *Holt* (3), *Gray* v. *Chaplin* (4), and the 40th Order of August 1841 (5), the proper objection for want of parties not having been taken by the answer of the defendants Hastings and Emly.

The Master of the Rolls, after expressing his great regret at the litigation that had arisen, which must be fruitless to all parties, said, the present was one of the first applications of a principle found necessary to be adopted to secure justice to parties against individuals who considered themselves not liable to come to any account; that the present was the case of a numerous partnership, some of the members of which had possessed themselves of the partnership assets, and were called upon to account for the same by a member of the partnership, who had a right to insist on an account being rendered. It was urged, that parties interested in the funds were not parties to the suit, and that was true; and if the bill had been filed seeking a general winding up of the partnership concerns, and settling the rights of the partners amongst each other, the Court could not grant the relief so sought, although to bring all the persons interested before the Court would be impracticable, but the present bill asked nothing of that kind. It had been argued, that the bill had no substantial object in view, but that was not the fact; and it had been decided that a party might file a bill praying to have the assets of a partnership collected, and yet not seeking the distribution of them. In the case before the Court, the club was established in the year 1837, a voluntary contribution was made by some of its members in aid of the club, the necessary furniture was pur-

(2) *Ante*, pp. 100, 302.

(3) 4 Myl. & Cr. 619; s.c. 10 Law J. Rep. (N.S.) Chanc. 138.

(4) 2 Sim. & Stu. 267; s.c. 3 Law J. Rep. Chanc. 161.

(5) Ord. Can. 176; 10 Law J. Rep. (N.S.) Chanc. 414.

chased by means of the contributions made, and a deed was afterwards executed in the month of January 1838, which was somewhat peculiar in its provisions; by that deed, if there should be a sale of the furniture and effects, 1,000*l.* was to be paid out of the proceeds to Peachy, a creditor of the club to that amount, after payment to the bankers of the club of the sum of 400*l.* (the amount of a loan made to the club) and interest due thereon. The matter went on, and in the year 1839 the club was actually dissolved, and then arose the question as to the disposition of the property belonging to it, and it was resolved at a meeting duly convened of the members, that there should be a sale of the furniture and effects and the lease of the club-house; at an adjourned meeting of the members of the club, it was resolved that the furniture should be sold by private contract; then there was the preparation of a written agreement, to which the plaintiff was made a party, but did not sign the same. What prevented that proposed agreement being perfected was not known, nor was it very material to inquire, but the furniture of the club was sold and paid for. The monies sought by the plaintiff to be paid into court, consisted of the proceeds of the sale of the furniture and other property which came into the hands of the defendants Hastings and Emly, and their conduct seemed to have been such as indicated great anxiety on their part to wind up the affairs of the club. Nothing could be found on which to hang an observation as to them, but Hastings and Emly in thus acting had done that which placed them in the situation of accounting parties, *i. e.* they obtained possession of the money arising from the sale of the furniture and other effects of the club, and it never entered into their minds that they were liable to be called to an account in respect of their receipts. Applications were made to them by the plaintiff for an account of the monies received by them, and of their disposition thereof, but not in a way that was agreeable to their feelings, and his Lordship was unwilling to believe that they would not give the account. The plaintiff was a trustee under the deed of the 27th of January 1838, and also a member of the club, and he now sued on behalf of all the members of the club except the defendants. The bill originally sought the winding up of the partnership concerns, and in conformity with *Evans* v. *Stokes* (6) it was held to be defective; it was then amended, and the extent of the relief sought limited, and it merely called for an account of those sums that had been received by the defendants, Hastings and Emly.—[Here His Lordship adverted to the two demurrers already referred to, and the decisions thereon]. It was to be regretted, on account of a portion of the argument adduced before the Court on the present occasion, that the case was not reheard on the last demurrer; the principle of the decision on that demurrer must, however, for the present, be deemed correct. The defendants Hastings and Emly had rendered an account by their answer, and such account might be quite accurate and just, and it might be that there was not an item in it that required alteration; but still the account as stated in the answer could not be accepted. If so, was there anything to prevent the Court following the usual course in such cases? Had not the plaintiff a right to say, I will have the accounts of the defendants taken according to the usual form and course of the Court? The objections raised, on the part of the defendants Hastings and Emly, had reference to the winding up of the affairs of the club, whereas the present bill merely sought steps auxiliary to the winding up of the concerns of the club—[here His Lordship referred to his judgment on the last demurrer—13 *Law J. Rep.* (N.S.) Chanc. 144]. Such was the old principle on which courts of equity acted; but it was no longer adhered to where the suit stopped short of praying for the winding up of the concerns of the partnership. It was not wished to avoid what appeared to be the most difficult part of the case. Monies of the club arising from the sale of the furniture, or from other sources, might eventually be found applicable to the winding up of its affairs, and if so, the Court might order the same to be carried to a particular account—a practice pursued by the Court in numerous cases, the Court not knowing who might appear ultimately entitled to it, or it might be found necessary to file another

(6) 1 Keen, 24; s. c. 5 Law J. Rep. (N.S.) Chanc. 129.

bill; but it was not necessary to decide that point in the present case; and whatever inconvenience might arise from such a course as that pointed out, it was less inconvenient than to allow an accounting party to say and insist that he would not account. The case was attended with considerable difficulty, but the Court was on the whole under the necessity of directing an account to be taken in respect of both the funds mentioned in the prayer of the bill. The Master of the Rolls repeated his expression of regret at being obliged to make one of the earliest decisions on so important a point.

His Lordship declined to dismiss the defendant Welch except by consent.

V.C. March 29; April 22. } PASCALL *v.* SCOTT.

Evidence—Interested Witness—Guardians of a Parish—Rate-payers—3 & 4 Vict. c. 26.

In a suit instituted against one of the guardians of a parish to establish certain defalcations in the accounts, it was determined that vivâ voce *examinations should take place before the Master. The Master objected to examine E. Scargill as a witness, he having been one of the guardians at the commencement of the suit, although he had since ceased to be such guardian, on the ground that as he had concurred in directing the proceedings, he might be made liable to the costs of the suit if it should turn out to have been improper:—Held, that Scargill had no further interest in the suit than any other rate-payer, and was enabled as such to become a witness under the 3 & 4 Vict. c. 26.*

This suit was originally instituted against Mr. Scott, one of the guardians of the parish of St. James, Clerkenwell, for the purpose of establishing a claim as to certain defalcations alleged to have taken place in respect of the accounts of the said parish, and to fix the defendant John Scott with the amount of monies improperly obtained possession of by him, belonging to the said parish. Upon a reference to the Master, it was decided that *vivâ voce* examinations should take place before him; and during such examinations it was proposed, for the purpose of establishing the claims against the defendant, to examine Edward Scargill, who was, for some years, one of the guardians of the poor of the parish, as a witness on behalf of the guardians. It appeared from questions put to the witness that he was a guardian from 1833 down to 1841, and had, during that time, been on the committee appointed for taking proceedings against the defendant, and had directed such proceedings as a member of the committee, and had agreed that Mr. Pascall and Mr. Adams, two of the members of the committee, should be the plaintiffs alone in the suit; that Mr. Selby was, at this time, solicitor in the suit; and that a sum of 300*l.* was paid to him by order of the committee on the 30th of March 1841. It was then submitted that Scargill was inadmissible as a witness on the ground that he had concurred with the rest of the guardians in appropriating monies of the parish to the expense of a suit which Pascall and Adams had instituted, and which they were not warranted in instituting under the act of parliament authorizing the raising of the rates; that it was a misapplication of monies of the parish, and, consequently, every person who took a part in that misapplication was liable to refund to the parish; and that Scargill being one of those persons, he was interested in the recovery of the costs from Scott's estate. Master Lynch, before whom the cause came, decided against receiving the evidence. Subsequently to this report a deed was executed between James Pascall and the representives of F. B. Adams (who had died) and E. Scargill, dated the 2nd of May 1846, by which E. Scargill was released by Pascall and the representatives of Adams, from all contribution or liability for or in respect of all or any past, present, or future costs of the said suits instituted against Scott. The cause having then been transferred from the office of Master Lynch to that of another Master, the decision of Master Lynch was reviewed, and his opinion was concurred in: the Master deciding to refuse the evidence of Scargill on the ground that if the proceedings should be found to be improper, Scargill would still be liable to an information being filed against him.

A motion was now made that the Master should be directed to receive the evidence of Scargill.

Mr. Teed and *Mr. Rogers* appeared in support of the motion, and contended that Scargill was merely a nominal party, suing on behalf of the parish, and therefore ought to have been admitted as a witness; that Scargill having been released from all liabilities by Pascall and Adams, he could only be affected by the proceedings to the same extent as the parishioners generally, and that under such circumstances he was expressly permitted to become a witness under 3 & 4 Vict. c. 26.

The following authorities were cited in support of the motion:—

Heming v. *Swinnerton*, 2 Phil. 79; s.c. *ante*, p. 90.
54 *Geo.* 3. c. 170. s. 9.
Meredith v. *Gilpin*, 6 Price, 146.
Doe d. *Boultbee* v. *Adderley*, 8 Ad. & El. 502; s.c. 7 Law J. Rep. (N.S.) M.C. 115.
3 & 4 *Vict.* c. 26.
The Queen v. *the Inhabitants of Doddington*, 1 Q.B. Rep. 411; s.c. 10 Law J. Rep. (N.S.) Q.B. 166.
Fletcher v. *Greenwell*, 1 Cr. M. & R. 754; s.c. 4 Law J. Rep. (N.S.) Exch. 126.
M'Gahey v. *Alston*, 2 Mee. & Wels. 206; s.c. 6 Law J. Rep. (N.S.) Exch. 29.
Carter v. *Pearce*, 1 Term Rep. 163.
Ralston v. *Rowat*, 1 Cl. & Fin. 424.
The Attorney General v. *Pearson*, 2 Coll. 581.
Hughes v. *Buckland*, 15 Law J. Rep. (N.S.) Exch. 233.
Needham v. *Law*, 12 Mee. & Wels. 560; s.c. 12 Law J. Rep. (N.S.) Exch. 316.
Lund v. *Blanshard*, 4 Hare, 290; s.c. 14 Law J. Rep. (N.S.) Chanc. 332.

Mr. Bethell and *Mr. Parry* appeared for other parties.

Mr. Stuart and *Mr. Daniel*, for the Master's report, urged that Scargill was virtually a plaintiff on the record, and, in that character, directly interested in the result of the suit; that he was interested in obtaining the decree, as it appeared on his examination that he had authorized payment out of the parish funds of the costs of this suit, in respect of which, if costs should not be ultimately decreed, he might be called upon to refund, upon an information filed by the Attorney General, at the instance of any rate-payer. Scargill was the person who had set on foot these proceedings. He was, however, afterwards appointed to the office of clerk to the guardians, and had consequently resigned his guardianship: it was evident, upon the whole case, that he was a substantial and not merely a nominal plaintiff. The release given to Scargill was not executed by all the parties interested, and was, therefore, useless.

The cases cited were—

Edwards v. *Goodwin*, 10 Sim. 123.
Bell v. *Smith*, 5 B. & Cr. 188; s.c. 4 Law J. Rep. K.B. 140.
The Attorney General v. *Compton*, 1 You. & Coll. C.C. 417.

The Vice Chancellor.—It appears to me that Mr. Scargill, independently of the fact of his being a rate-payer, is no way whatever liable to the costs of the suit. Mr. Selby, who was the solicitor first employed in this suit, has been paid his costs. Mr. Selby has ceased to be such solicitor, and the person now carrying it on is carrying it on under the authority of other persons who employ him, and he looks to those gentlemen to be paid his costs. I cannot comprehend the proposition that he, not being a party to the record, can by any means be made liable to the costs of the suit. It appears to me also, that if the guardians recover the fund it will be disposed of by them as guardians: their having the fund in their hands may tend to the benefit of the present and future rate-payers, because it is manifest that the parish has by some means been compensated for those losses. It appears to me, all that is recovered will be either a bonus to the rate-payers or go to pay off the losses. I do not think that in any way Scargill can be considered as a person having any interest except as a rate-payer, and in that character the statute has provided that he should be a competent witness.

L.C.
April 24. } ARNOLD v. GARNER.

Mortgage of Ships—Sale—Brokerage.

A mortgagee of ships who had also a lien on the cargoes, sold the ships and cargoes under an order of the Court, with the concurrence of the receiver, appointed in another suit for the administration of the debtor's estate, and the Master had allowed him 4l. per cent. upon the proceeds arising from the sales by way of commission, which rate of commission he had been in the habit of receiving from the ship-owner, who was then dead:—Held, upon exceptions, that the mortgagee was not entitled to so large a brokerage; but that he was entitled to a reasonable allowance, to be ascertained by the Master, if the parties could not agree.

Held, also, that he was not entitled to any brokerage on the sale of another cargo, which he had sold as mortgagee, without any order of the Court.

Mr. Joseph Garner, merchant, of Liverpool, who died in January 1844, had numerous transactions with the firm of Roscow, Arnold, & Leete, of which firm the plaintiffs were the surviving partners. In the course of these transactions, Garner had become indebted to Roscow & Co., and he executed to them mortgages of three ships, the *Arabian*, the *Kathleen*, and the *Cora*, and also gave to them a lien upon the cargoes of the *Kathleen* and *Cora*. They had also a lien on the cargo of another vessel, called the *Cleofrid*. After the death of Mr. Garner, the plaintiffs, at the request of his widow and executrix, who was the first-named defendant, advanced further sums for the purpose of completing the cargo of the *Kathleen* and *Cora*, which were then about to sail, for which advances they were to have a lien on the proceeds of the cargoes and on the return cargoes. A creditors' suit had been instituted for the administration of the estate of Mr. Garner; and in March 1844, the present bill was filed, the prayer of which was to have an account of the transactions between the plaintiffs' firm and Garner, and to have the balance due to the plaintiffs paid out of the proceeds of the ships and the cargoes.

In July 1844, an order was made by Vice Chancellor Wigram, that the defendant should be restrained from interfering with the sale of the ships and the cargoes, and that they should be sold by the plaintiffs, with the concurrence of the receiver who had been appointed in the creditors' suit. This order did not include the cargo of the *Cleofrid*, which had been sold by the plaintiffs on their own authority. In pursuance of that order, the ships and the cargoes therein mentioned had been sold; and the plaintiffs had paid into court, to the credit of this cause, the monies which arose from those sales, deducting 4*l.* per cent. from the amount for brokerage and *del credere*, and the Master in taking the accounts had allowed this deduction in favour of the plaintiffs.

The defendant, the executrix of Mr. Garner, filed exceptions to the Master's report, which were heard before Vice Chancellor Wigram, in March 1847, when his Honour allowed the exceptions, and directed the plaintiffs to pay into court all the monies which they had retained for brokerage.

They presented a petition of appeal to the Lord Chancellor, and insisted that they were entitled to be allowed those sums. They grounded the claim upon an agreement which had been entered into by them with Mr. Garner in his lifetime, under which they had been in the habit of receiving 4*l.* per cent. for commission and brokerage, on sales made by them for Garner, during his life.

Mr. Walker and *Mr. Eddis*, in support of the appeal, contended that the plaintiffs had not taken upon themselves any fiduciary character, which rendered it their duty to sell the vessels or the cargoes; that the arrangements which subsisted between them and Mr. Garner at the time of his death, were adopted by his executrix; and that the plaintiffs acted in the transaction upon the faith that those arrangements would still be carried out in the same manner as they had previously been observed. They cited—

Hammonds v. *Barclay*, 2 East, 227.
Gaussen v. *Morton*, 10 B. & C. 731; s. c. 8 Law J. Rep. K.B. 313.
Bunbury v. *Winter*, 1 Jac. & W. 255.

Leith v. *Irvine*, 1 Myl. & K. 277.
Sayers v. *Whitfield*, 1 Knapp, 133.

Mr. Romilly and *Mr. Prior*, for the executrix, insisted that as to the sale of the cargo of the *Cleofrid*, the plaintiffs acted merely as mortgagees, and had not obtained any order from the Court authorizing the sale; and, therefore, the order of the Vice Chancellor Wigram was at all events right as to this part. That as to the other sales, which were made under the order of the Court, the order was asked for as a security and benefit to the plaintiffs. If they had not agreed with the receiver respecting the sale, it would have taken place under the direction of the Master, and if they chose to act, they must retain their character of mortgagees, and were not entitled to say that they acted as brokers. They cited *Chambers* v. *Goldwin* (1).

Mr. Walker replied.

The Lord Chancellor said, that if the plaintiffs sold as mortgagees, they were not entitled to charge commission or brokerage. That the sale of the cargo of the *Cleofrid* seemed to be made in that character; and, therefore, he should not disturb the order of Vice Chancellor Wigram on that point. But with respect to the other ships and the cargoes of them, the plaintiffs acted under the order of the Court. The Court had appointed them to sell: they waived their right to sell as mortgagees in possession, and submitted to the authority of the Court, with regard to the selling of that property which they had in their possession as mortgagees. Acting, therefore, as officers of the Court for this purpose, his Lordship thought they were entitled to a commission for their trouble, not according to the agreement which subsisted between them and Mr. Garner, but according to a fair and ordinary rate of commission: and unless the parties could agree between themselves what that reasonable commission ought to be, it must be referred to the Master to inquire what brokerage ought to be allowed to them.

(1) 5 Ves. 834, and 9 Ves. 254.

V.C.
April 27. } WALSH v. TREVANION.

Witness—Confidential Communications—Interrogatory—Demurrer.

A witness, in demurring to certain interrogatories as to the production of letters, stated, that they did not refer to any particular estates to be settled, and that such letters were received in his character of confidential solicitor; and that the documents referred to contained particulars of confidential matters between himself and his clients:—Held, that the witness had not sufficiently shewn what was the subject of the communications, or that they were actually of a confidential character.

The object of this suit was to rectify the settlement made on the marriage of the defendants, J. C. Trevanion and Charlotte his wife; and the question was, whether such settlement was intended to comprise the whole of certain property which was subject to the joint power of appointment of the defendant, J. C. Trevanion, and his father, or whether it was intended to comprise any part of such property.

The solicitor, Mr. Burley, who prepared the settlement, was examined in the suit, and the object of the interrogatories was to ascertain what was the correspondence that had taken place prior to the preparation of the settlement, and whether any alteration had subsequently occurred in the intention of the parties.

By the fifteenth interrogatory it was asked, whether there was any correspondence, and whether or not in writing, in reference to the settlement to be made on such marriage, on the part of the said J. C. Trevanion and J. Trevanion, or which of them; and by the seventeenth interrogatory, whether there was or not any and what correspondence in writing between any person or persons, and whom, in relation to the exhibit or the property therein contained; and by the twenty-ninth interrogatory, whether there was or not in his possession, custody, or power, any books or book, papers or paper, containing any entries or entry relating to or connected with the settlement made or intended to be made on the part of the said defendant J. C. Trevanion

and J. Trevanion, or either of them, on the marriage of the said J. C. Trevanion with the said Charlotte Trevanion.

The following demurrer was put in by Mr. Burley to these interrogatories:—

To so much of the fifteenth and seventeenth interrogatories as call on me to produce any correspondence in writing with reference to the settlement to be made on the marriage of J. C. Trevanion and Charlotte his wife, on the part of the said J. C. Trevanion and J. Trevanion, I demur, so far as regards the production of any letters I received with reference to the aforesaid matters from the said Mary Trelawny Brereton and Charlotte Trelawny, or either of them: and for cause of demurrer, say, that such letters do not refer to any particular estates to be settled on such marriage, and I received such letters in my character of confidential solicitor to the said M. T. Brereton and C. Trelawny. I therefore submit I ought not to be called upon to produce the same.

To so much of the twenty-ninth interrogatory as requires me to produce and identify the books or papers containing any entries or entry relating to or connected with the settlement to be made on the part of the said J. C. Trevanion and J. T. P. B. Trevanion, or either of them, on the marriage of the said J. C. Trevanion with the said Charlotte Trelawny, and to the close of the said interrogatory, I demur; and for cause of demurrer say, that the said book or ledger contains particulars of confidential matters between myself and my clients: and I humbly submit to this Court whether I am bound to produce the same.

Mr. Stuart and *Mr. Beavan*, in support of the demurrer, contended that a witness, being a professional man, was justified in refusing to disclose any matters which related to a confidential communication between him and his client. The object of the present inquiry had reference only to the purchase of an estate, and the solicitor who was employed in making the settlement upon the marriage of a young lady was required to produce all the private communications which had taken place with reference to that transaction. The following cases were cited:—

Carpmael v. *Powis*, 1 Phil. 687; s. c. 15 Law J. Rep. (N.S.) Chanc. 275.

Herring v. *Clobery*, 1 Phil. 91; s. c. 11 Law J. Rep. (N.S.) Chanc. 149.

Mr. Bethell and *Mr. Willcock*, contrà, urged that Mr. Burley, in his answers to the interrogatories, had not sufficiently averred that the communications referred to were confidential. *Primâ facie*, the letters appeared to have nothing confidential in them. It appeared, that on the marriage of Miss Trelawny various communications took place respecting the property then about to be settled, and the interrogatories were framed for the purpose of ascertaining what was the agreement between the parties at the time with respect to certain portions of the property. They had reference, not to matters of consultation, but matters of fact. A solicitor was bound to answer what was the fact; and all that was required was a statement as to when the negotiations for the settlement terminated, and what they were intended to include.

The Vice Chancellor.—I can understand, that if this gentleman had been pressed on the question, he might have stated what would have shewn that these communications were confidential; but the question now is, whether he has sufficiently expressed them so upon these two demurrers—[His Honour then read the first demurrer]. It appears to me, the witness has failed in stating, by this demurrer, that the letters which he refuses to produce were of a confidential character; and I think he has not stated that fact sufficiently when it is made the ground of a lawful objection to answer. Then as to the twenty-ninth interrogatory, it is, in itself, quite general. [After reading the second demurrer, his Honour continued.] The witness does not say that they contain matters of confidential communication with reference to the subject of the twenty-ninth interrogatory, as between him and the two ladies, or either of them. My opinion is, that he has not, by his position of fact, made sufficient ground for protection.

The objection cannot, therefore, be sustained.

M.R. April 21, 26. } JORDAN *v.* FORTESCUE.

Legacy—Codicil—Construction.

A testator, by will, gave to A, his butler, a legacy of 500*l.* *By the first codicil to his will the testator bequeathed a further legacy of* 500*l.* *to A, which the testator declared to be in addition to the like sum bequeathed to him by the will. By a second codicil the testator bequeathed to A.* 500*l.* *in addition to the* 1,500*l.* *which he had before bequeathed to A:—Held, that A. was entitled to a legacy of* 2,000*l.*

The Right Hon. Thomas Grenville, by his will, dated the 2nd of January 1845, (amongst other specific and pecuniary bequests) gave to the plaintiff, William Jordan, his butler, 500*l.* By a codicil to his will, dated the 24th of July 1845, the testator bequeathed to the plaintiff a further legacy of 500*l.*, which the testator thereby declared to be in addition to the like sum bequeathed to the plaintiff by his will. By a second codicil to the will, dated the 14th of December 1846, the testator bequeathed as follows:—"I give and bequeath to William Jordan five hundred pounds in addition to fifteen hundred pounds which I have before bequeathed to him."

The bill was filed by W. Jordan against the executor of the testator, and prayed a declaration that, under the testator's will and codicils, he was entitled to a legacy of 2,000*l.*, and that the plaintiff might be paid the same out of the testator's estate.

The defendant demurred to so much of the bill as prayed a declaration that the plaintiff was entitled to a legacy of 2,000*l.*, and by answer admitted the will and codicils.

Mr. Kindersley and *Mr. Pole*, in support of the demurrer, contended that the last codicil contained no expression of intention to give a legacy of 2,000*l.*; that the language used therein by the testator was a mere recital, which would not carry the legacy; and that supposing by the earlier will and codicil 2,000*l.* had been given, if the words used in the second codicil meant to make up that sum, nothing could pass by that codicil. *Milner* v. *Milner* (1) was cited in support of the demurrer.

(1) 1 Ves. sen. 106.

Mr. Turner and *Mr. Cairns*, for the plaintiff, contended that the probability was in favour of the testator having executed some other codicil which had been cancelled; that the 1,500*l.* mentioned in the second codicil was a mere clerical error, and that by it 500*l.* was intended to be given plus 1,500*l.*, the words, "which I have before bequeathed to him," being surplusage. The cases of—

Bibin v. *Walker*, Ambl. 661.
Adams v. *Adams*, 1 Hare, 537; s. c. 11 Law J. Rep. (N.S.) Chanc. 305.
Sanford v. *Raikes*, 1 Mer. 653.
Crowder v. *Clowes*, 2 Ves. jun. 449.

were cited for the plaintiff.

The MASTER OF THE ROLLS, after referring to the will and codicils, expressed his opinion that the plaintiff was entitled to a legacy of 2,000*l.*; and added, that when the testator was making his first codicil he was not acting under any mistake, whilst making his second codicil he thinking only how far his own bounty extended; that it was immaterial how much the testator had given previously to the date of the second codicil; that the testator in giving, by the second codicil, 500*l.* in addition to 1,500*l.*, meant to give the plaintiff a legacy of 2,000*l.*; that the additional words used by the testator at the conclusion of the bequest were not sufficient to cut down the same; and the probability was sufficiently strong to justify the conclusion that the gift was one by implication of a legacy of 2,000*l.*

M.R. May 8. } WATTS *v.* SYMES.

Amendment—Clerical Error—General Orders of 23rd of November 1831.

In the description of the plaintiff, he was called John Watts, his true name being William John Watts, as evidenced by the body of the bill and answers. Leave was given to amend the bill by altering the name J. Watts into W. J. Watts, on giving notice to the defendants of the intention to alter the name pursuant to the order of the Court.

Mr. Shapter moved for leave to amend the bill, by altering the name of the plain

from "John Watts" to "William John atts," it appearing from the body of the ll, as well as from the answers, that W. Watts was the true name of the plaintiff. o notice of the present motion having en served, the registrar declined to draw an order to amend to the effect now ught, obtained as of course, and which l been served on the defendants, on the und that the same was not an amend- nt contemplated by the 13th of the neral Orders of the 23rd of November 31 (1).

The MASTER OF THE ROLLS said, he felt ne difficulty in making the order asked, the absence of notice to the defendants; t if the plaintiff chose to take on himself risk of an order made in the absence the defendants, he would pronounce an ler discharging the existing order to end, and then the order of the Court uld direct the amendment sought to be de, the plaintiff in the mean time giving tice to the defendants of the amendment ended to be made in the name of the intiff.

BRUCE, V.C. May 8. } FINDLAY *v.* LAWRENCE.

Costs—Motion to dismiss.

The defendant served the plaintiff with tice of a motion to dismiss the bill for nt of prosecution. Before the motion s made, the Master, on an application to e for that purpose, gave the plaintiff liberty amend the bill on payment of 10*s. costs. he defendant brought on the motion for the rpose of obtaining the costs of the service the notice:—Held, that the defendant as regular.*

The defendant on the 1st of May served e plaintiff with notice of a motion, intended be made on the 8th of May, that the bill hould be dismissed for want of prosecution.

On the 2nd of May the plaintiff gave the efendant notice of an intention to apply to he Master for leave to amend the bill.

On the 6th of May the parties went before he Master, to whom all the circumstances of the case (including the service of notice of the motion for the dismissal of the bill) were mentioned; and the Master, on a consideration of the question, gave the plaintiff liberty to amend on payment to the defendant of 10*s.* for costs. The plaintiff did not offer to pay the defendant the costs of the notice of motion to dismiss; and the defendant did not ask the plaintiff to pay such costs.

The defendant now brought the motion on for the purpose of obtaining the costs incurred in respect of the notice of motion.

Mr. Fooks, for the motion, cited *Attorney General* v. *Cooper* (1).

Mr. Steere, contrà, contended that the defendant had no right to bring the motion on. All the circumstances had been considered by the Master, and after his decision, the defendant had no claim in respect of these costs.

K. BRUCE, V.C., said that the Master had no jurisdiction in respect of the costs of the notice of motion, and that the defendant was regular in bringing the motion on in respect of costs.

After some discussion as to the amount of these costs, it was ultimately agreed that the plaintiff should pay the defendant 50*s.* in respect of them.

M.R. Feb. 8; March 26; May 6. } BAKER *v.* SOWTER.

Vendor and Purchaser—Irregularity—Payment of Debts—Costs of Suit—Decree.

Under a decree made in an administration suit, the bill not praying a sale of the testator's real estate, the Master made his report, finding a very small balance of personal estate in the executor's hands, but not sufficient to pay the costs of the suit. By a decretal order made on the Master's report, a sale was directed of the real estate, under which A. became the purchaser, and he was found to be such by the Master's subsequent report, which was afterwards confirmed by

(1) Ord. Can. 8; 1 Law J. Rep. (N.S.) Chanc. 1.

(1) 9 Sim. 379; s. c. 8 Law J. Rep. (N.S.) Chanc. 19.

an order of the Court, and leave was at the same time given to A. to pay the purchase-money into court. That order was served on all necessary parties and passed, and the purchase-money paid into court. A. then presented a petition, praying the discharge of that order, insisting that the Court had no power to make the order for the sale of the real estate, or even if it had, that such power had not been properly exercised by the Court. It appeared that one of the defendants beneficially interested was a minor at the date of the original decree. Petition dismissed, without costs.

This was a petition by the purchaser of certain freehold messuages sold under a decree of the Court, praying the discharge of an order of the Court, dated the 27th of January 1847, directing payment of his purchase-money and interest. The bill was filed against the surviving executor and trustee of the will of Robert Hussey, by the parties beneficially interested in his real and personal estate, and prayed the establishment of the will and the execution of the trusts thereof, and the usual accounts of the rents and profits of the devised freehold and leasehold estates, of the general personal estate, and of the testator's debts, funeral and testamentary expenses; but there was no prayer for sale of the freehold estates or any part thereof. By the decree made in the cause at the hearing on the 23rd of December 1841, after directing the establishment of the will, the usual administration accounts were directed to be taken of the real and personal estate and effects of the testator, and of his debts, funeral and testamentary expenses; and inquiries were also directed to be made as to any sales that had been made of the testator's freehold and leasehold estates by the defendant Sowter, the surviving executor and trustee. The Master having made his report, by which it appeared that a very small sum of 7*l.* only was forthcoming, being the balance due from the executor in respect of the testator's personal estate, the report was confirmed, and by a decretal order made on further directions, dated the 2nd of March 1846, which referred to the decree of the Court, the general report, &c., it was amongst other things ordered, that the two freehold messuages of the testator situate in Spencer Street, Shoreditch, being num[illegible] 7 and 8, should be sold with the u[illegible] directions, and thereby the consideratio[illegible] all further directions and the paymen[illegible] the costs already taxed, and the costs ther[illegible] directed to be taxed, and the subseq[illegible] costs of the suit until after the M[illegible] should have made his report, were reser[illegible] and any of the parties were to be at lib[illegible] to apply. The petitioner, Henry Cl[illegible] became the purchaser of the two free[illegible] messuages, by the decretal order directe[illegible] be sold, at the sum of 260*l.*; and [illegible] Master having reported the petitioner [illegible] the purchaser thereof, the report was [illegible] firmed by an order *nisi* on the same [illegible] It was afterwards arranged between [illegible] solicitor for the defendant and the [illegible] parties to the suit and the petitioner, [illegible] the petitioner should on the 23rd of [illegible] 1846 apply on motion to the Court, [illegible] the consent of all parties, to confirm [illegible] report absolutely, and for leave to pa[illegible] petitioner's purchase-money with in[illegible] thereon into court. That order was [illegible] tained, drawn up, and served on all [illegible] parties; and shortly afterwards, on the 2[illegible] of August 1846, the petitioner cause[illegible] statement, in writing, of his objections [illegible] requisitions to the title to the freeh[illegible] premises to be left with the solicitor of [illegible] parties to the suit: answers were sent [illegible] those objections and requisitions, and ul[illegible] mately the petitioner declined to pass [illegible] order obtained by him for payment of [illegible] purchase-money and interest. The pu[illegible] chaser had not entered into possession [illegible] or into receipt of the rents or profits of th[illegible] freehold premises purchased by him. Even[illegible] tually the order was passed, at the solic[illegible] tation of the parties to the suit, by th[illegible] registrar, notwithstanding the petitioner'[illegible] protest against its being passed, on th[illegible] ground that the Court had no power to [illegible] make the order for the sale of the freehol[illegible] messuages, or if it had, still that such [illegible] power had not been properly exercise[illegible] by the Court. The order contained th[illegible] usual recital, that the purchaser by his [illegible] counsel declared himself content with th[illegible] title to the premises comprised in Lot 1 [illegible] part of the estates in question in the cause [illegible] The petition further stated the fact of Henry [illegible] Knight, one of the defendants beneficially [illegible] interested, being a minor at the date of th[illegible]

decree of the 2nd of March 1846, and that the plaintiff, Caroline Baker, might still have children who would become interested in the purchased premises under the testator's will.

Mr. Tinney and *Mr. Hardy*, in support of the petition.—No ground is alleged to justify the sale of the freehold messuages; there is no direction contained in the will authorizing a sale, and a balance is forthcoming from the personal estate of the testator on the taking the accounts before the Master: besides, other personal estate of the testator may be outstanding, and the portion of the costs of the suit to fall on the real estate may eventually turn out to be of inconsiderable amount. Again, there is no suggestion that the testator's real estate will be required for satisfaction of any costs; and it is clear on the face of the will that there are no persons competent to convey the freehold premises—*Calvert* v. *Godfrey* (1), *Lechmere* v. *Brasier* (2).

Mr. Kindersley and *Mr. Sheffield*, for the plaintiffs in the cause.—The purchaser is not affected by any irregularity. The first claim against the testator's estate is that of the creditors; next, that of the legatees; and then comes the claim of the parties to the suit to be paid their costs. There has been a decree made for the taxation of the costs of all parties to the suit, and it is not because there may be found some outstanding personal estate and effects that the creditors or other claimants are to wait: and unless the petitioner can satisfy the Court that it has no jurisdiction in the matter, the present application cannot succeed. It is contrary to practice and the usual form of decrees, to recite in a decree the cause of the sale of an estate.

Mr. Turner, for the defendant Sowter, the executor, contended that the costs of the suit were the first charge upon the personal estate, which had been almost wholly exhausted in satisfaction of the testator's debts and legacies, and therefore the parties so entitled to their costs had a right at once to stand in the place of the creditors and legatees whose claims had been satisfied.

Mr. Tinney, in reply.

(1) 6 Beav. 97; s. c. 12 Law J. Rep. (N.S.) Chan. 305.
(2) 2 Jac. & W. 287.

The MASTER OF THE ROLLS observed, that not a single instance had been produced in support of the application, where a decree in an administration suit directing a sale of real estate had been held to be erroneous, because the personal estate had not been found insufficient for payment of the debts and legacies.

May 6.—The MASTER OF THE ROLLS, after stating the nature of the application, and that the decree in the suit was not such an one as would on due consideration have been pronounced by the Court, said, that the debts had been paid out of the personal estate, and there was no reference in the decree to the only circumstance that could justify the sale of the real estate; that if a purchaser could be released from his purchase on the ground simply of irregularity in the decree, the present application might be granted; but there was no allegation in the petition either of want of jurisdiction or want of parties; and after perusal of the cases of *Lloyd* v. *Johnes* (3), *Bennett* v. *Hamill* (4), and *Curtis* v. *Price* (5), he was of opinion that the purchaser in the present case was not entitled to be discharged from the order complained of; and the application was refused, but without costs.

L.C. April 23. { BRIDGES *v.* THE WILTS, SOMERSET, AND WEYMOUTH RAILWAY COMPANY.

Railway—Lands Clauses Consolidation Act, Construction—Notice to Land-owner.

Where a railway company proceeds under the 85th section of the Lands Clauses Consolidation Act, it is sufficient that the proceedings are approved of by two Justices, and the company is not required to give notice to the owner of the land which is sought to be affected by those proceedings.

The plaintiffs were trustees under a will of some land which was required by the Wilts, Somerset, and Weymouth Railway Company, and some negotiations had passed between the parties for the purchase of it,

(3) 9 Ves. 37.
(4) 2 Sch. & Lefr. 566.
(5) 12 Ves. 89.

but no arrangement had been finally settled between them.

The company adopted the course pointed out by the 85th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. (1), and deposited the proper sum in the Bank of England, and executed a bond which they tendered to the plaintiffs.

The plaintiffs thereupon filed a bill, and moved for an injunction, according to the terms of the prayer of the bill, to restrain the company from taking possession of their land.

The application was made first to the Vice Chancellor of England, who refused it. It was then renewed before the Lord Chancellor.

Mr. J. Parker and *Mr. Torriano* appeared for the plaintiffs, and referred to the 85th and 59th sections of the act, and contended that the company could not proceed without giving notice to the land-owner; and that the direction in the 85th section as to the giving the bond with two sufficient sureties to be approved of by two Justices, if the parties differed, shewed that the parties were to have an opportunity of raising any discussion, if they thought it necessary.

Mr. Bethell and *Mr. Osborne* appeared for the company, but were not called upon.

The Lord Chancellor said, the case appeared to him to be free from doubt. Where notice was required by the act, it was done so in express terms, but when you came to the 85th section, no notice was insisted upon. He thought the company had done all which they were called upon by the act to do, and that the company were entitled to take possession of the land.

(1) Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the Bank by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two Justices in the manner hereinbefore provided, in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond, under the common seal of the promoters, if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters, or any two of them, with two sufficient sureties, to be approved of by two Justices *in case the parties differ*, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the Bank, for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking, in respect of the lands so entered upon, together with interest thereon, at the rate of 5*l.* per cent. per annum, from the time of entering on such lands, until such purchase-money or compensation shall be paid to such party, or deposited in the Bank for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them, under the provisions of this or the special act."

Wigram, V.C. May 8. } STEED *v.* OLIVER.

Witness—Examination of Co-defendant after Decree.

An order for leave to examine a co-defendant as a witness may be obtained ex parte *as well after as before decree; and the question, whether the proposed witness is or is not interested, can only be raised upon objections to the reception of the evidence.*

This was a bill for an account against three defendants, the co-executors of the testator in the cause. After the decree at the hearing, two of the defendants took in a state of facts before the Master, and then obtained, *ex parte*, the common order for leave to examine their co-defendant in support of the state of facts, saving just exceptions, upon the allegation that the party proposed to be examined had no interest in the matters in question in the cause.

The plaintiff now moved to discharge that order for irregularity.

Mr. Romilly and *Mr. Prior*, for the motion, contended that the order for leave to examine a co-defendant was not an order

of course after decree, but that a special application was necessary; and that the defendant, whom it was proposed to examine as a witness, was manifestly interested with his co-defendants in the account to be established by the state of facts; and that the provisions of the 6 & 7 Vict. c. 85. did not apply to such a case.

Mr. Eade, contrà, contended that an order to examine a co-defendant was of course, both before and after decree—*Van* v. *Corpe* (1), *Paris* v. *Hughes* (2); and that the question of the competency of the witness might be raised when the examination of the witness was offered in evidence.

WIGRAM, V.C. refused the motion, with costs.

M.R. May 3. } DORMAY *v.* BORRADAILE.

Insurance — Construction — Covenant to keep up Policy—Suicide of Covenantor—Will—Legal or Equitable Assets.

A testator, by his will, after devising his real estate to his executors for the benefit of his wife and children, expressed himself as follows:—"My executors are charged with the payment of my just debts, of which I shall leave an account with the letter named above to my dear wife:"—Held, that the testator's real estates were equitable assets for the payment of his debts.

The same party, previously to his marriage, covenanted with certain persons as trustees to pay, during his life, all premiums and other monies, and do and perform all such acts, matters, and things as should be requisite for keeping on foot a policy of assurance previously effected by him on his own life; and the policy contained a proviso, declaring that it should be void in case the party should die by his own hands. The party was afterwards drowned in the River Thames; and by the verdict of a jury, returned in an action at law, directed by the Court to be brought by the executors of the settlor against the assurance company, it was found "that the settlor threw himself into the River Thames, intending to destroy himself, but that at the time of committing the act he was incapable of judging between right and wrong:"—Held, that the trustees of the settlement were not entitled to claim as against the settlor's estate the sum secured by the policy.

William Borradaile, on the 30th of May 1828, effected a policy of assurance with the London Life Association on his own life for the sum of 1,000*l.*, which contained a proviso, making void the policy in case the assured should die by his own hands. That policy was made the subject of a settlement dated the 26th of June 1828, on the occasion of the marriage of William Borradaile, by which he covenanted with the four trustees of the settlement that he would, during his lifetime, duly pay all such premiums and other monies, and do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot the said policy of assurance. The marriage was duly solemnized. On the 16th of February 1838, William Borradaile was drowned in the Thames, having been found in that river on the 20th of March 1838; and the verdict returned on the coroner's inquest held on the body was, "that William Borradaile was found drowned on the 20th day of March 1838, in the waters of the river Thames, in the parish of St. Margaret, Westminster, but when, how, and where, or by what means, he came to his death there was not evidence adduced to the jurors." W. Borradaile, on the 14th of March 1832, made his will, which was as follows:—

"I, William Borradaile, vicar of Wandsworth, being at this time in good health and sound mind, do make this my last will and testament. I do devise all my property of every description to my beloved wife, Agnes Sarah Blizzard Borradaile, and I trust entirely to her executing, as far as is possible, all the bequests I have made in a letter to her bearing the same date as this will. I do appoint as my executors the Rev. Joseph Shaw, rector of High Ham, Somersetshire, Mr. Abraham Borradaile, of 34, Fenchurch Street, London, Miss Sarah Borradaile my

(1) 3 Myl. & K. 269; s.c. 6 Law J. Rep. (N.S.) Chanc. 208.

(2) 1 Keen, 1; s.c. 5 Law J. Rep. (N.S.) Chanc. 149.

sister, and my beloved wife Agnes Sarah Blizzard Borradaile. To these my executors I give all that the advowson and right of presentation to the living of Wandsworth, in trust for my said wife, during her lifetime, and for my children, equally, at her death. I give also to my said executors, in trust for my said wife and children, all my estate at Wandsworth, whether consisting of a paddock of two acres and a half, or cottage or farm buildings, or my interest in ten acres, for which I have entered into an agreement for purchase from Mr. William Tritton; all my wines, books, household furniture, plate, trinkets, and everything else of whatever description belonging to me, I do give to my said beloved wife, for her sole use and benefit. My executors are charged with the payment of my just debts, of which I shall leave an account with the letter named above to my dear wife. This my will I make in consequence of the near approach of a most alarming disease (the cholera), intending, should it please God to spare me for a few days longer, to give instructions to my solicitor to prepare one in perhaps more correct form. Witness my hand and seal this 14th day of February in the year of our Lord 1832.

"William Borradaile (L.S.)

"Witnesses to the signature of the Rev. William Borradaile, Frederick Wadeson Shaw, J. Mills, G. Brissenden."

Abraham Borradaile alone proved the will. Due notice of the death of the testator was given, by the trustees of the settlement, to the assurance office, and application was also made for payment of the amount assured, which was refused. The trustees then caused an action to be brought in the Court of Exchequer, in the name of the executor of the testator, for recovery of the amount assured. The action was tried in the latter end of the year 1841, and the verdict of the jury was, "that William Borradaile threw himself into the River Thames, intending to destroy his life, but that at the time of committing the act he was not capable of judging between right and wrong." The verdict was entered for the defendant in the action.

A rule was afterwards obtained to set aside the verdict; and after argument thereof, in Trinity term 1842, the judgment of the Court was given on the rule, Judges Erskine, Maule, and Coltman being adverse to the rule, and Chief Justice Tindal expressing his opinion in favour of it, whereupon judgment was entered up for the defendant. The Master, by his general report, made in pursuance of the decree of the Court dated the 18th of July 1843, found that the trustees were entitled to claim the sum of 1,000*l.* assured by the policy, with interest thereon, at the rate of 4*l.* per cent. per annum from the 1st of July 1838 (the time at which the same ought to have been paid if the policy had been duly continued), against the estate of the testator, and to rank as specialty creditors of the testator in respect thereof. The plaintiffs, who were simple contract creditors of the testator, took exceptions to the Master's finding; and the same were argued on the 24th of November 1845, when the Master of the Rolls ordered a case to be made for the opinion of the Court of Common Pleas, and that the question should be, whether the trustees of the settlement [naming them] were entitled, under and by virtue of the testator's covenant contained in the indenture of settlement, to recover the 1,000*l.* secured by the policy from the executor of the testator; and it was ordered that all facts necessary to bring the matter into question should be stated in such case; and it was ordered that the finding of the verdict in the action hereinbefore mentioned against the assurance office be stated, not only as being found by such verdict, but also as being the fact; that the name of Abraham Borradaile the executor, as one of the trustees of the settlement, be omitted in such case, and that the fact also be omitted of any payments having been made by or on behalf of the assurance office, in respect of the policy. The consideration of the accounts and further directions was ordered to stand over until the Judges should have made their certificate.

In Hilary term, 1847, Judges Coltman, Maule, and Cresswell certified their opinion that the trustees of the settlement were not entitled at law, under the covenant contained in the settlement, to recover the 1,000*l.* from the executor of the testator.

The cause now came on to be heard on the equity reserved, and the opinion of the Judges of the Court of Common Pleas: and

the questions to be decided were, first, whether the trustees of the settlement were entitled, under the covenant therein contained, to receive the 1,000*l.* and interest out of the testator's general estate; and, secondly, whether the effect of the testator's will was to make his real estate equitable assets for the payment of his debts.

Mr. Kindersley, Mr. Roupell, Mr. Turner, and *Mr. John Baily*, appeared for the different parties (1).

The MASTER OF THE ROLLS, after stating the facts, said that covenants were to be construed according to the intention of the persons who were parties to them; that he thought the covenant of William Borradaile, in the present case, to keep the policy of assurance on foot, was not tantamount to a covenant to do nothing by which the policy should be forfeited; and he could not, therefore, imply an obligation, on the part of the settlor, not to destroy his own life or that he or his executors should pay a certain sum of money if he did so; that as to the expression found in the verdict of the jury, returned in the action at law, "that at the time of committing the act William Borradaile was incapable of judging between right and wrong," it was plain the party might be incapable of judging between right and wrong without being insane, and the testator might pass for a man of sense on ordinary occasions; that his Lordship's opinion was wholly independent of the particular verdict that had been returned by the jury in the action at law; and he thought that the self-destruction of William Borradaile, the settlor, did not make the trustees creditors of the testator's estate. As regarded the other point, his Lordship expressed his opinion in favour of the testator's devised real estate being equitable assets; and the decree accordingly directed the testator's residuary estate to be divided rateably amongst the testator's creditors, except the trustees, covenantees under the indenture of settlement.

(1) Vide Symons *v.* James, 2 You. & Coll. C.C. 301, and the cases of Finch *v.* Hattersley, Henvell *v.* Whitaker, and Dover *v.* Gregory, there referred to.

M. R.
Feb. 26;
March 2, 3;
May 6.

FEISTEL *v.* KING'S COLLEGE.

Office — College Fellowship — Duties thereof — Assignment of Income — Public Policy.

An assignment by a fellow of King's College, Cambridge, of the profits of his fellowship, by way of mortgage, for securing the re-payment of a sum of money advanced to him, and interest thereon, is not contrary to public policy, in respect of the duties incident to the situation or office; neither is there anything in the nature of the income of the fellowship from which it can be inferred that the emoluments are not assignable in equity.

Although the assignment is contrary to the implied intention of the founder of the college, and to the spirit of the statutes regulating the college, and may be a violation of the duty of the fellow to the college, it is nevertheless not void.

In a suit instituted by the assignee against the fellow the assignor, and the College, the Court directed the fines already apportioned to the assignor to be applied in satisfaction of the plaintiff's demand, and the necessary accounts to be taken of all sums then or thereafter to be appropriated to the fellow by the College.

The bill in this case was filed by A. Feistel against the provost, scholars, and bursar of King's College, Cambridge, and Lionel Buller, one of the senior fellows of that college, seeking payment out of the emoluments of his fellowship of the sum of 300*l.*, advanced to him by the plaintiff, and interest thereon. The indenture by which the assignment of the income and emoluments of the fellowship was effected, was dated the 28th of December 1842, and made between Mr. Buller of the one part, and the plaintiff of the other part, and is so substantially set forth in the Master of the Rolls' judgment as to render any statement of it here quite unnecessary. Notice of the indenture was duly given to the bursars of the college; and after the interest had run in arrear the bursars were required by the plaintiff to pay to him the amount apportioned to Mr. Buller as the income of his

fellowship: this being refused, the plaintiff filed his bill against the several parties already mentioned. The defendant Buller, by his answer, raised several objections to the bill, insisting that the *res gestæ*, having relation to the assignment, amounted to a case of fraud, and also of usury. The Court, however, was of opinion that neither fraud nor usury was proved against the plaintiff. The defendant Buller's next objections were, that the assignment was void, first, as being contrary to public policy; second, on account of the uncertain amount of the emoluments of the fellowship; and, third, because it would defeat the intention of the founder of the college, and render the defendant unable to perform the duties devolving upon him under the statutes of the college. The other defendants, in their answers, admitted that the office of senior fellow was totally unconnected with the administration of justice, or any ecclesiastical duties, or the cure of souls; but submitted that the assignment of the fellowship was prohibited at common law, contrary to public policy, and inconsistent with the spirit of the college statutes. They also submitted that to decree the relief prayed by the bill would amount to an interference with the visitorial jurisdiction and the internal regulation of the affairs of the college.

Mr. Kindersley and *Mr. Glasse*, for the plaintiff, contended, amongst other things, that there was nothing of an ecclesiastical nature or character in the office of a senior fellow of King's College to prevent an assignment being made of its emoluments; that the only ground of objection was the alleged necessity of a residence at the college on the part of the fellows, and that had of late years become obsolete and not attended to, as was admitted by the answer of the defendant Buller; and that there was no evidence adduced by the defendant Buller to substantiate the allegations contained in his answer of fraud or oppression practised towards him on the part of the plaintiff or of usury.

The following cases were adduced on behalf of the plaintiff:—

Matthews v. *Burdett*, 2 Salk. 672.
Queen's College case, Jac. 1.
Spencer v. *Cox*, 1773, in the note to *Stone* v. *Lidderdale*, 2 Anstr. 533.
Grenfell v. *Dean and Canons of* l
sor, 2 Beav. 544.
Berkeley v. *King's College*, (
Vice Chancellor of England, 7
August 1830, not reported; in
case an application was made
receiver, and refused by the (
because the nature of the emolu
of the office did not appear.

Mr. Turner and *Mr. T. H. Ha*
behalf of the bursars of the college, by
answer, insisted that the emoluments
fellowship were not assignable; and
such assignment was inconsistent wit
nature and condition of the office of
and the spirit and intention of the st
of the college; and asked that the bill
be dismissed against them with costs.

Mr. Tinney and *Mr. Doria*, for the
dant Buller, after addressing himself
charges of fraud and usury alleged again
plaintiff in the defendant Buller's a
contended that there were certain
attached to the office of a senior fell
King's College which could not be perf
by a deputy, and it was a general rul
emoluments connected with an office
only be assignable when the office
was assignable; that the assignment
fellowship had never been sanctioned
court of law; that if the office or situ
were legally assignable by deed, why s
it not be so in the event of bankrupt
insolvency?—a thing that had never
heard of; that if the office were assig
a stranger to whom it had been ass
would have a right to join the provos
fellows in the combination room after d
and to dine in the college hall; that
was no instance to be found in the l
of an action at law having been br
against a college for not affording ac
modation to a fellow, the application a
being in such a case to the visitor o
college; that if the fellow could not l
appoint a deputy, he could not l
assign his fellowship; and, if so, he
not assign the emoluments arising fro

The following authorities were cit
behalf of the defendant Buller:—

Antony a Wood's Antiquities of Ox
4th of July 1515, vol. 2, pp. 2,
Oliver v. *Empson*, Dyer, 1.

Sir Henry Nevill's case, Plow. 377.
Maund's case, 7 Rep. 28 *b*.
Barker v. *Vansommer*, 1 Bro. C.C. 149.
King v. *Hamlet*, 4 Sim. 223; s. c. 9 Law J. Rep. Chanc. 243.
Flarty v. *Odlum*, 3 Term Rep. 681.
Lidderdale v. *Duke of Montrose*, 4 Ibid. 248.
Barwick v. *Reade*, 1 H. Black. 627.
Mosely v. *Warburton*, 1 Lord Raym. 265.

The statutes of King's College were referred to in the course of the argument on several occasions, with reference to the duties and obligations of the fellows.

Mr. Kindersley, in reply.

The Master of the Rolls.—Out of respect to the argument which I have heard, and what I conceive to be the great importance of the point which is raised here with regard to the colleges in both universities, I shall certainly not give my opinion on the main point now; but I will look into the cases, although I cannot say I entertain any reasonable doubt on the application of the law to the present case.

This gentleman, the defendant in the case, in the year 1842 being pressed for money, being, as has been alleged by counsel, in a state of the greatest distress, (but whether that was so or not does not appear by the evidence any otherwise than it appears he wanted money,) he obtained from the plaintiff money under circumstances certainly deserving of observation. He obtained at the time, in money, I think not more than the sum of 90*l*. 16*s*. 4*d*., of which 56*l*. was paid to a person who, for anything that appears to the contrary, was the very person who was pressing for the payment of money, and for whose payment he wanted it, but that does not appear in evidence: 5*l*. were paid at one time to this gentleman himself, and at another time 29*l*. 16*s*. 4*d*. The costs of an insurance were 22*l*., and the costs of the security were 36*l*. 17*s*. 6*d*. and 6*s*. 2*d*., those sums made together 150*l*.; and he agreed at the time to take goods from the plaintiff, who is a wine-merchant, that is, wine and brandy to the amount of another sum of 150*l*., and the two sums of 150*l*., making together 300*l*., were to be the subject of the security. This gentleman having entered into this transaction, the security being bills of exchange, policies of insurance, and an assignment of his fellowship, does not pay the debt which he had contracted. Being called upon in this court for payment, the defence which he raises is, in the first place, this, viz. that he was taken by surprise, defrauded, tricked into giving securities which he never before intended to give, and which he was by surprise induced to give at the time, and to circumstances of that sort he has positively pledged his oath in his answer; and it appears, by testimony and by letters in his own hand, that the statement so made in his answer is not true. My opinion in this case is, that it does not appear by any evidence to be relied upon that this gentleman was surprised in the transaction which took place. Whatever it was, he did it with his eyes open; he pressed for it; he was fully aware of the nature of the transaction, and instead of it at all approaching that case to which it has been likened, he himself went, and went with his friend, for the purpose of ascertaining the value of the goods which he took as part of the transaction. I am therefore of opinion that the transaction cannot be set aside on that ground; and it is to be borne in mind too here, that he does not come forward as a person desiring equitable relief,—he does not come forward in the character of a person saying, "I have been oppressed, injured; I am willing to pay what is just, but do not compel me to pay more than is just;" he comes here on an entirely different footing, offering nothing except in the event of his not succeeding in declining payment of all. That is his first defence.

The next defence is this, viz. that it was an usurious transaction, on the ground that the security given was a security so connected with land as not to be within the exception of the statute, and a case is cited on that point; but the objection is one which cannot prevail on this occasion and in this course of proceeding.

But then comes the most important part of the case, and with the exception of what is alleged in the answer, I consider the most unfortunate part of this case. Finding difficulties in raising money, he offers the security of the fellowship, or the profits of his fellowship. "Lend me this money," he

says, "you will be safe." He authorizes a communication with the persons from whom it was supposed information on the subject might be obtained: avails himself of it to give the assignment of other securities—which he did; and having obtained such money as he did obtain, and given his fellowship as an inducement and a pretended security, he says, "What I have done is worth nothing at all; it cannot avail you in the least; I will set you at defiance." This is a transaction brought forward in a court of equity at this day. If it is the law, he must have the benefit of it; but do not let us mistake the nature of this transaction. "There is my fellowship; give me the money, and I will give you the security. Now I have got the money, the security is not worth a straw."

Now the security is said not to be worth anything, first of all because the subject of the assignment was uncertain; he says, "I did not know how much I was to receive one year and how much another year; there might be wanted for the purposes of the college one sum at one time and another sum at another time. It is so uncertain that it cannot be the subject of an assignment." It is next said, it is contrary to the policy of the law: I am in the situation of a fellow of the college. I should be sorry to say a syllable,—it would be quite contrary to all that has appeared on this occasion, if there was a syllable to be uttered with respect to the college; it has behaved itself in a manner worthy of its high character on this occasion, and worthy of persons filling the eminent station they do. He says, "I have a duty to perform to the college, I am to support myself, and do what is fit for the dignity of the college and the decency of appearance,"—and these things have been put forward among the reasons; "and therefore I may go abroad soliciting persons to lend me money on the security of it, and then say it is good for nothing, you have no claim on me." If the fellow of a college receiving his stipend under circumstances detailed in this case, is entitled to hold his income free from all claims of creditors, and free from all assignments or pledges that he may make of it—if that be so, certainly it is most important it should be known, in order that persons who are dealing with gentlemen in this situation may understand that when they are (security on their fellowships they ar ing that which has been declared t fraud: if that be so, the matter shc well understood. That is one point ' mean to reserve.

Then it is said it is directly cont the statutes. When it is said it is c to the statutes, no doubt, it is to sumed, that every fellow of the col to conduct himself in the world with l and propriety; that his conduct, h racter, all that is about him, should such a nature as to reflect hono dignity on the foundation to which longs, and, as far as any of the proc which have been detailed to us present occasion are contrary to tho poses, no doubt, they are in violation rules of the college; but are they violation of the rules of the colle the purpose which it is destined answered here is to prevail?

The next and the last point rel the visitorial authority. It is state "although what is now sought to b might be very proper to be done, ought not to be given to the assignm a court of equity, because it could made available without interfering w discipline and the arrangements of t lege, that is, the visitorial jurisdictio shall take that point in connexion wi other, because I am much surprise question of that sort being raised ab being a visitorial question. The q does not relate to anything more th which from time to time becomes a to this gentleman individually. The is one in which the public is to a co able extent interested when it co this, whether it can deal with a fel a college on the same footing a other people, because of the protect his income.

May 6.—The MASTER OF THE RO This bill is filed by A. Feistel against College, Cambridge, and Lionel Bu fellow of that college, praying that it declared that under an assignment in t mentioned, the plaintiff is entitled to l the income of Mr. Buller's fellowshi that accounts may be taken of what to the plaintiff under that assignmer

of what is due to Mr. Buller in respect of his fellowship, and that the college may be ordered to pay what is due to the plaintiff on his security out of what shall be found due to the defendant Buller in respect of his fellowship.

The defendant Buller, in December 1842, requested the plaintiff to lend him money on the security of the income of his fellowship; and the plaintiff having agreed to do so, an indenture, dated the 28th of December 1842, was executed between Mr. Buller of the one part, and the plaintiff of the other part; and thereby, in consideration of 300*l.* stated to be lent to Buller by the plaintiff, Buller granted and assigned to the plaintiff the income and emoluments payable to him in respect of his fellowship, to have and receive the same to the plaintiff for his own use, in trust, however, to reassign the same in case Buller should pay the plaintiff 300*l.* and interest on the 30th of June then next, but if default should be made, then a power was given to the plaintiff to dispose of the income and emoluments, and out of the money to arise from such sale, and out of the income until the same should be sold, to pay the costs of the sale, and then to pay and retain to himself the 300*l.* and interest, or so much thereof as should remain due; and by the same indenture, Buller appointed the plaintiff receiver of the income and emoluments of the fellowship, and he contracted to pay the 300*l.* and interest, and agreed that notwithstanding the power to sell, the plaintiff might resort to his right and remedy as a mortgagee by way of foreclosure or otherwise; and it seems to have been further agreed, that the security should not be resorted to so long as the interest on the loan was regularly paid. Notice of the indenture was given to the college in January 1843; and in September in the same year Mr. Buller having neglected to pay any interest, the plaintiff by his solicitor, requested the college not to pay to Buller the income of his fellowship, but to pay the same to the plaintiff. The bill was filed in November 1844, stating that the college and the bursar of the college refused to pay anything to the plaintiff, and that the whole sum intended to be secured by the indenture remained due to the plaintiff. Mr. Buller admits that he was in 1842 and is now a fellow of the college; that the provost and fellows of the college are entitled to some definite and proportionate shares of the income arising from the property of the college and otherwise; and that he, as a fellow, is entitled to some yearly sum of money or dividend payable by the college or the bursar, in the proportion in the answer mentioned. The defendant has further, in his answer, set forth facts and allegations, from which he desires it to be inferred that he was imposed upon in the transaction which ended in the assignment of the income of his fellowship, and that the transaction was usurious and void; and he submits that the dividends of his fellowship or his share as fellow of the income or property of the college, are not assignable, inasmuch as (he says) such assignment would defeat the intention of the founder of the college, and render the defendant unable to perform the duties devolving upon him as a senior fellow thereof under the statutes, and that such assignment would be contrary to the principles of public policy, which require that the intention of the founder or donor should be strictly preserved and executed.

The transaction between the plaintiff and Mr. Buller is one of those transactions that courts of justice are frequently under the necessity of executing, without approving of them in themselves. I have before stated my opinion, that the evidence in this case does not establish any such case of fraud and imposition as is alleged by Mr. Buller in his answer, and, therefore, that the indenture of December 1842 cannot be impeached on the ground of usury. I am also of opinion, that there is nothing in the nature of the income which a fellow of King's College is entitled to, from which it can be inferred that his income and emoluments are not assignable in equity by reason of the uncertain amount or otherwise. The cases of assignments at law, which were cited in the course of the argument, are not applicable to this case; but the question here is, whether there are any such duties incident to the situation, or office as it is called, of a fellow, as to make the assignment of the income contrary to public policy. The assignment may be contrary to the implied intention of the founder of the college, contrary to the spirit of the

statutes, which are the exponents of the intention of the founder, and may, therefore, expose the assignor to consequences very unpleasant to himself and very injurious to those who have dealt with him on the faith of his assignment; it may be a violation of his duty to the college, and very reprehensible, without being on that account void, as contrary to public policy. The advantages to the fellow which are annexed to the fellowship are very great, and when well used by a studious and well-conducted person may secure to himself the means of acquiring independence and distinction in life, and may secure to the world some fruits of his useful pursuits; but the easy duties which are annexed to it are duties which seem to be intended for the purposes and benefit of the college, and not for the public, otherwise than in a secondary and remote sense, as it is for the benefit of society, that is, for the benefit of the public, that all lawful trusts should be duly executed, and all lawful contracts duly performed.

The fellow of a college may be summoned to attend the meetings of the other fellows; if he attends, he may vote in the election of officers, assist in what this defendant thinks proper to call the due administration of justice between the fellows, and assist in carrying into effect the statutes; but the defendant himself distinctly admits that the office, situation, or post of senior fellow now held by him, is not an office in any way connected with the administration of justice, or an ecclesiastical office of any nature or character, that there is not any cure of souls attached thereto; and not only denies that there is any provision in the statutes, rules, or regulations of the college which renders it incumbent on him to be resident in the college, but if there be any such rule, that it has long since ceased to be or to be considered binding on the fellows.

There is nothing in this case which appears to me in any degree to resemble any of the cases in which assignments of income have been held void on the ground of public policy. The college may deal as the law allows them with a fellow who has assigned his fellowship; but I am at a loss to conjecture what special interest the public can have in the question, whether Mr. Buller does or not continue to be a fell—w, —does or not hold himself in readines— to perform such slight duties as are anne—ed to the benefit he is intended to enjoy. I do not think the public are at all concerne— in the question, whether Mr. Buller contin— ues to be a fellow or not;—whether the fell— w-ship now occupied by him shall be at ny time hereafter occupied by him or any o— ner person: and I do not propose to interfer— in any way with the internal arrangement— of the college, with their authority over in— di-vidual fellows, or the dividends they m— apportion in respect of any fellowship. am to consider only the dividends they m— at this time or hereafter apportion to M— Buller. It appears to me, Mr. Buller h— effectually assigned such dividends as ma— be apportioned to him, and that there is n— sufficient reason to induce this Court to abstain from giving effect to such assign-ment; and, therefore, I must order that, for the purpose of paying what is due to the plaintiff, the sums of money which already have been or may be hereafter apportioned to Mr. Buller, in respect of his fellowship, shall be applied in or towards satisfaction of the plaintiff's demand; and the necessary accounts must be taken. I do not mean to direct any account of the income and emoluments of the college, but only an account of the sums of money which now or hereafter may be by the college itself apportioned or appropriated to Mr. Buller; and I will either appoint a receiver of such sums of money as may be hereafter appropriated, or adopt any other mode of securing the plaintiff's interest which may be more satisfactory to the college itself. The costs of this suit ought to be paid by the plaintiff to the college, and he is to have them over, with the other costs, against the defendant Buller.

K. Bruce, V.C. May 4. } ROBLEY v. RIDINGS.

Will — Construction — Children — Time for Division of a Fund.

A testator, by his will, bequeathed his residuary estate to trustees upon trust for A. but with the proviso that if A. died without having attained the age of twenty-one, and without leaving lawful issue him surviving

the trustees should pay the money m his estate unto and equally among ldren of C, and the children of D, sue of such of them as should die wful issue, such issue taking their hare. A. died under twenty-one, ut having been married. B. was of the residuary legatees who at- nty-one. C. had children living th of the testator, and born after- Held, that the children of C. born he death of the testator and B.'s twenty-one, were entitled to share uest.

l M'Collough, by his will, dated March 1836, gave his residuary personal estate to Thomas Brown, , executors, administrators, and ipon trust, to pay the testator's arly rent-charge of 200*l.*, for the id maintenance of herself and the naintenance, and education of his ard John M'Collough, until he tain the age of twenty-one years, as she should continue his widow. hen proceeded as follows:—"And after the time that my said son attained his said age of twenty- then I devise and bequeath my and personal estate unto my said heirs, executors, administrators ns; subject, nevertheless, as to state, with the payment unto my and her assigns of the annual sum during her life or widowhood. ase my said son shall depart this it having attained his said age of ie years, and without leaving law- him surviving, then I direct that 'homas Brown, his heirs, executors, itrators, shall stand seised and pos- all and singular my said real bject to the said annuity of 100*l.*, residue and accumulations of my nal estate, upon trust to sell and ie same into money, and to pay the money to arise by the sale rsion thereof respectively unto and nong my niece Elizabeth Holland, en of my sister Martha Woolley, children of my sister Elizabeth ually, share and share alike, and of such of them as shall die, leaving lawful issue, such issue taking only his, her, or their parent's share; such shares and portions to be paid and payable to such legatees, being a son or sons at the age of twenty-one years, or being a daughter or daughters at the age of twenty-one years or day of marriage, which shall first happen. And I further direct that in case any of the said legatees shall die under age, and without issue or unmarried, then and in such case the share or shares of such child or children so dying shall be divided equally between and among the survivors and survivor of them, and the issue of such of them as shall be then dead, leaving issue, share and share alike; such issue taking only his or their parent's share. And I further direct that during the minority of them the said legatees or any of them, in case they shall become entitled under this my will, my said trustee, his heirs, executors, or administrators shall stand seised or possessed of the share or shares of such legatee or legatees so under age, and place the same out at interest on government or other securities, and pay and apply the interest, dividends, and profits thereof unto and towards the maintenance and education of such legatee or legatees during the continuance of his, her, or their minority."

The testator died in March 1836. The testator's son, Edward John M'Collough, died in April 1836, under the age of twenty-one years, and without ever having been married. Elizabeth Holland, who married Mr. Ridings, was the first of the residuary legatees who attained the age of twenty-one years. Mrs. Woolley had children living at the death of the testator, and also had children born between the death of the testator and Elizabeth Holland's attaining the age of twenty-one years.

The suit was instituted by the trustee under the testator's will, for the administration of the testator's estate. The only question now argued was, whether the children of Mrs. Woolley, born between the death of the testator and the attainment of the age of twenty-one years by Elizabeth Holland, were entitled to shares of the testator's residuary estate.

Mr. C. Hall, for the plaintiff.

Mr. Russell, Mr. Elmsley, Mr. Prior, and *Mr. Eddis*, for other parties.

The following cases were cited:—

Gilmore v. *Severn*, 1 Bro. C.C. 582.
Andrews v. *Partington*, 3 Bro. C.C. 401.
Barrington v. *Tristram*, 6 Ves. 345.
Whitbread v. *Lord St. John*, 10 Ves. 152.
Gilbert v. *Boorman*, 11 Ves. 238.
Davidson v. *Dallas*, 14 Ves. 576.
Titcomb v. *Butler*, 3 Sim. 417.
Balm v. *Balm*, 3 Sim. 492.
Brandon v. *Aston*, 2 You. & Coll. C.C. 24, 30.

KNIGHT BRUCE, V.C.—My impression is that the words "the children of my sister Martha Woolley," a child-bearing woman, are sufficient to include all her children; and that the generality of that expression ought not to be restricted without necessity or good reason. An argument in favour of confining the description to the children living at the death of the testator, is afforded very plausibly by the language of the clause providing for maintenance, which this will contains. This is the only difficulty; and I think that it is not strong enough to counteract the judicial disposition to enlarge the gift as much as possible. I think I may hold that every person coming into *esse* before Elizabeth Ridings attained twenty-one is interested. By that decision I do not think that I depart from *Davidson* v. *Dallas*, which must have proceeded upon the words of that particular will.

K. BRUCE, V.C. April 20. } BLAGRAVE v. BLAGRAVE.

Evidence.

Real estate was by will devised in trust for A. for life, with remainder for B. for life, with remainder for C, for life, with remainder for the first and other sons of C. in tail. Personal estate was by the same will bequeathed on a series of limitations corresponding to those on which the real estate was settled. A. was trustee of the real estate, and C. of the personal estate. A suit was instituted by B. against A. in respect of alleged mismanagement of the real and personal estate, and some evidence entered into on the part of B. An was instituted by the first tenan against A, in respect of the sam There was no suggestion that the examined in the first suit were de capable of giving evidence in th suit. Upon a tender of the evidence in the first suit at the hearing of t suit,—Held, that it was not admis

John Blagrave, the testator in tl devised his real estate to truste trust for John Blagrave of Sout life, with remainder to the defend Blagrave, for life, with remainder t and other sons in tail, with rem Thomas Blagrave, for life, with r to his first and other sons in t remainder to Anthony Blagrave, with remainder to his first and o in tail, with remainders over. The bequeathed his personal estate o of limitations corresponding to th which his real estate was settled. time of the filing the bill in this s Blagrave was tenant for life in p of the real and personal estate of tator, and trustee of the real esta A. Blagrave was trustee of the estate. There was no issue eithe Blagrave or T. Blagrave. Two s instituted against Col. Blagrave, i of alleged mismanagement of the personal estates. T. Blagrave plaintiff in one of them, and the e of A. Blagrave was the plaintiff in t Evidence had been entered into o of T. Blagrave in the suit in whic plaintiff. At the hearing of the cause, the evidence adduced in t mentioned suit was tendered on the plaintiff as evidence in this suit was no suggestion that the witnes dead or incapable of being examin reception of this evidence was obj on the part of the defendant Col. I

Mr. Russell and *Mr. Glasse*, plaintiff.

Mr. Wigram, *Mr. Lloyd*, a *Craig*, for the defendants.

The following cases were cited:-

Nevil v. *Johnson*, 2 Vern. 447
Byrne v. *Frere*, 2 Moll. 157.

City of London v. *Perkins*, 3 Bro. P.C. 602.
Carrington v. *Cornock*, 2 Sim. 567.

KNIGHT BRUCE, V.C.—Were the point before me substantially a point decided by the House of Lords, in *The City of London* v. *Perkins*, or any other case, of course there would be no room for argument,—I must necessarily decide according to that case. Subject to the question as to the decision of the House of Lords, I am not aware that the point is governed by decision. In the case of *The City of London* v. *Perkins*, the question arose upon a custom, and was, as I understand it, between the City of London and the public; and, although different individuals may have been before the Court in each case, the parties were substantially the same. There are other cases to which the same observation may apply.

The case here stands thus:—there is a tenant for life, in possession of an estate, subject to a series of limitations under a particular will, and he is also a tenant for life of certain personal estate, which stands upon a corresponding series of limitations. The tenant for life happens to be the trustee as to the real estate; he is not the trustee as to the personal estate. Two suits are instituted against him in respect of alleged mismanagement,—alleged improper treatment of the real and personal estate. One of these suits is instituted by the person who is the next tenant for life, subject to the contingency of the tenant for life not having issue: the other suit is instituted by the present tenant in tail, who comes behind or after the two tenants for life in remainder. The evidence which is the subject of the present discussion has been taken in the suit in which the next tenant for life in remainder is the plaintiff. The question is whether, without proof, and without suggestion either that the witness thus examined is dead, or is or has been unable to be examined, his evidence taken in the other suit shall be received in the suit in which the first tenant in tail is plaintiff. I am of opinion that I am not required by authority, and that I ought not in point of principle, to allow the evidence to be read.

END OF EASTER TERM, 1847.

CASES ARGUED AND DETERMINEI

IN THE

Courts of Chancery.

TRINITY TERM, 10 VICTORIÆ.

WIGRAM, V.C. May 31. } STEADMAN *v.* POOLE.

Baron and Feme — Separate Estate — Restriction on Anticipation — Purchaser — Notice.

A testator gave to M. A., a married woman, certain leasehold houses, for her whole and sole use during her life, free from the controul of her present or any future husband, and not to be sold or mortgaged, and after her decease to her heir or heirs; and provided her child or children should die before her, then that she at her decease might leave them to whom she would for the remainder of the term. By a deed, in which M. A. was named as a party, in consideration of a debt due from her husband to the defendant P, the husband and M. A. demised, by way of under-lease, the premises to P, for the term of twenty-six years, if M. A. should so long live, reserving only the rent of the original lease. P. afterwards underlet the same premises successively to the two other defendants, who had no other notice of M. A's interest than the circumstance that M. A. was a demising party in the under-lease to P. On bill by M. A. it was held, that the fact of M. A. being a party to the under-lease to P. made it incumbent upon the other defendants to inquire as to the interest of M. A, and the under-leases were ordered to be set aside.

George Scrooby, the testator, being] sessed of two leasehold houses, Nos. 1 2, Kent's Place, Paddington, held by under a lease from the Grand Junction C Company, for the term of ninety-e years, from September 1823, at a ren 10*l.* per annum, by his will, gave as lows:—

"I give and bequeath to my el daughter, Mary Ann Steadman, in addi to what she has already had, my two le hold houses, and all appurtenances bel ing thereto, being Nos. 1 and 2, K Place, for her whole and sole use, du her natural life, and free from the cont of her present or any future husband, not to be sold or mortgaged, and after decease to her heir or heirs; and prov her child or children should die before then she at her decease may leave the whom she will for the remainder of term."

The testator died on the 15th of M 1835, and the executor having assente the bequest, Mary Ann Steadman sh after the death of the testator, entered possession of the premises. In Nover 1838, Mrs. Steadman deposited the ab mentioned indenture of lease with Th Poole, by way of equitable mortgage securing a sum of money, the amou advances made at various times by P to Mr. Steadman, her husband, and

thereupon received from Poole a memorandum in the following words:—

"November 14, 1838.

"Thomas Poole has received of Mary Ann Steadman, the lease of two houses, situate in North Wharf Road, Paddington, as security for 50*l.* advanced this day.

"Thomas Poole."

Poole then entered into possession of the premises, and afterwards made further advances to Mr. Steadman. On the 20th of March 1840, Thomas Poole alleging that the sum of 323*l.* 17*s.* was then due to him in respect of such advances, an indenture of under-lease of that date was executed, purporting to be made between Thomas Steadman and Mary Ann Steadman his wife, of the one part, and Thomas Poole of the other part, whereby it was witnessed, that in consideration as well of the expense incurred and to be incurred by the said Thomas Poole in and about the repairs and improvements of the premises intended to be thereby demised, and also of the rents and lessee's covenants thereinafter reserved and contained, and likewise of the sum of 323*l.* 17*s.*, to the said Thomas and Mary Ann Steadman, that day paid by the said Thomas Poole, they the said Thomas Steadman and Mary Ann his wife, did demise and lease to the said Thomas Poole, his executors, administrators, and assigns, all those, &c. (being the premises demised by the above-mentioned lease from the canal company,) to hold the same with the appurtenances unto the said Thomas Poole, his executors, administrators, and assigns, from Christmas-day then last, for the term of twenty-six years, if the plaintiff should so long live, paying yearly during the said term the yearly rent of 10*l.*, clear of all rates, taxes, and other deductions, together with such sums as would be to be paid to the said canal company for insurance from fire, &c.

By an indenture dated the 18th of November 1840, T. Poole, in consideration of 200*l.* demised the premises by way of under-lease to the defendant Edney, to secure the payment of an annuity of 20*l.* per annum; and in December 1843, granted a second under-lease of the premises to the defendant Dunbar, to secure the sum of 200*l.* In September 1844, Edney entered into possession of the premises; and in August 1845, the bill was filed by Mrs. Steadman, by her next friend, against Poole, Edney, Dunbar, and Thomas Steadman, her husband, praying that the indenture of March 1840 might be set aside, and that the same might be delivered up to the plaintiff to be cancelled, and for an account of the rents and profits thereof subsequently to the institution of the suit. The defendant Poole having become bankrupt after the filing of the bill, his assignees were brought before the Court by supplemental bill, and by their answer disclaimed.

Mr. Wood and *Mr. Southgate*, for the plaintiff, contended that the under-lease of March 1840, was, in truth, a sale in consideration of the debt then due to Poole from the defendant Steadman, and could not be supported against the wife, to whom the property was given by the will to her separate use, and who was expressly restricted from mortgaging or selling the same—*Jackson* v. *Hobhouse* (1). The absence of notice would make no difference, because the property was inalienable in equity; but if it did, the fact of the plaintiff having joined with her husband in the deed ought to have put the parties upon inquiries as to her interest.

Jackson v. *Rowe*, 2 Sim. & Stu. 472; s. c. 4 Law J. Rep. Chanc. 118.

Jones v. *Smith*, 1 Hare, 43; s. c. 11 Law J. Rep. (N.S.) Chanc. 83.

The Attorney General v. *Backhouse*, 17 Ves. 293.

West v. *Reid*, 2 Hare, 249; s. c. 12 Law J. Rep. (N.S.) Chanc. 245.

Baggett v. *Meux*, 1 Coll. 138; s. c. 13 Law J. Rep. (N.S.) Chanc. 228.

Mr. Romilly and *Mr. Tremenheere*, for the defendant Edney.—Mrs. Steadman had a separate estate for her life, with an absolute reversion, which she might have disposed of—*Sir E. Turner's case* (2), *Tudor* v. *Samyne* (3), and *Donne* v. *Hart* (4). The lease was not an alienation within the terms of the restriction, but a method of enjoying the estate. But the defendant Edney is a purchaser without notice; for the circumstance that the wife was a party to the lease of 1840, was not notice of her

(1) 2 Mer. 483.
(2) 1 Vern. 7.
(3) 2 Ibid. 270.
(4) 2 R. & M. 360; s. c. 1 Law J. Rep. (N.S.) Chanc. 57.

separate interest. The wife has stood by and concealed her interest from the purchasers, and therefore will have no remedy against them in equity—*Savage* v. *Foster* (5), *Watts* v. *Creswell* (6), *Evans* v. *Bicknell* (7), and *Jackson* v. *Hobhouse*.

WIGRAM, V.C.—The property was given to Mrs. Steadman, by the will, for her whole and sole use, with two qualifications: one, that it should be free from the controul of her husband; and the other, that it should not be aliened. The gift was clearly to the separate use of the lady. Then, with reference to the question of notice, the rule which I deduced in *Jones* v. *Smith* was, that if a purchaser at the time of his purchase has no notice of an interest in another, he is not bound to make inquiry, but that if he does know of such an interest in the property, he is bound at his peril to inquire what that interest is. Thus, in *Allen* v. *Anthony* (8), where a tenant in possession under a lease had an interest under an agreement posterior to his lease, the purchaser from the landlord was held bound by it. So in *Taylor* v. *Baker* (9), a party at the time of making his purchase and before it was made, had actual notice that one Strong had a judgment, or warrant of attorney, which affected the purchased estate. It turned out, however, that Strong had a mortgage and not a judgment; and the Court held, that the purchaser, having notice that Strong had an interest affecting the premises, could not ward off the claim of the incumbrancer, only because the nature of the claim was different from that which the notice conveyed to him. In the present case, notice of the lease to Poole, in which Mrs. Steadman had joined, was not denied; and the case appeared to be one in which the under-lessees were clearly bound to have made inquiries as to her interest. I have no doubt upon this point of notice, without going into the difficult question, how far a married woman having a separate interest, and standing by while her husband sells to an innocent party, can afterwards come here to defeat that sale.

(5) 9 Mod. 35.
(6) 9 Vin. 415.
(7) 6 Ves. 174.
(8) 1 Mer. 282.
(9) 5 Price, 306.

The decree must go for setting asi indentures of lease, and delivery of sion to the plaintiff, and for an acc the profits since the filing of the bil costs to be given up to the hearin subsequent costs reserved.

WIGRAM, V.C. May 24, 25; June 5, 8. } LAYCOCK v. JOHNS

Jurisdiction—Equity of Bill-h Bankruptcy of Drawer and Accepto

W. & Co. were in the habit of con wools for sale to T. R, a wool-facto bills were drawn by W. & Co. up accepted by T. R. against the wool & Co. became bankrupt, and such bil then outstanding to a large amount. with the concurrence of the assignees & Co., by deed, assigned certain sol debts, due to him in respect of such to A. & B, in trust, to get in the sa apply the monies in such manner as would by law be entitled to apply th T. R. afterwards became bankrupt. B, having got in the debts to a large filed their bill against the assignees o Co. and of T. R, praying that the t the deed of assignment might be e under the direction of the Court. decree, after ordering payment into the funds in the hands of A. & B, d inquiries as to the scheduled debts, a as to the bills, whether the same were and accepted against the wools ge or any particular part thereof, and wi the then holders thereof; and the was to be at liberty, if he should thin publish advertisements for the person ing to be the holders of such bills, t in and make out their claims befor and further directions were reserve pursuance of the advertisement, the of the bills brought in their claims the Master, who, by his report, fou all the bills were drawn and accepted the wools generally in the hands o The cause coming back upon the re was held, that the bill-holders w entitled to appear on the further dire and that the Court of Equity, by its could only order the fund to be pa

to the bankrupt's estate found entitled to it; leaving the claims of the bill-holders, under the principle of Ex parte Waring (1), *(if any) to be settled under the administration in bankruptcy.*

The facts of this case, as found by the Master's report, were as follows:—Previously to and in the year 1841, Tristram Ridgway carried on business at Huddersfield as a wool-factor. In the course of his business he received and sold, as agent and factor for Henry Wilkins & John Wilkins, wools consigned to him for sale by them. Ridgway also received and sold, as agent and factor for George Pressey, wools consigned to him for that purpose by Pressey, who was the agent, in respect of these wools, of David and James Pollak, of Vienna. In May 1840, the Messrs. Wilkins and Pressey were concerned in the purchase of wools (principally German wools) on joint account; and which wools, to a large amount, purchased on such joint account, were from time to time consigned to Ridgway for sale, down to the month of May 1841, when the Wilkins' became bankrupt. Ridgway had notice of the joint interest of those parties in the wools so consigned to him. In those transactions, Pressey was also agent for the Pollaks. The Messrs. Wilkins, before and up to the month of May 1841, were also engaged with Pressey and one Mr. Cartwright (the manager of the North Wilts Banking Company) in the purchase of wools, principally colonial, on joint account, which wools were also consigned by the Messrs. Wilkins to Ridgway for sale, but on the joint account of the Wilkins', Pressey, and Cartwright, in equal shares. In these speculations the Pollaks had no interest.

In May 1840, the Wilkins' had a joint speculation in wool with one Brideman, of Vienna. Those wools were by Brideman consigned to his agent Simon Renter, and Renter, at the instance of the Wilkins', consigned parts of those wools to Ridgway for sale, on joint account of himself and the Messrs. Wilkins in equal shares. In the above transactions Ridgway sold the wools in his own name, and the accounts of such sales were from time to time made out by him to the Wilkins' alone.

(1) 19 Ves. 345.

In December 1840, the Messrs. Wilkins and George Pressey requested Ridgway to accept bills of exchange to be drawn by them upon him, and ultimately upon a representation made to him by the Wilkins' and Pressey, that the bills were to be deposited with the North Wilts Banking Company, as security for money to be advanced to pay for the wools, and that the amount of such bills would be covered by the property in T. Ridgway's hands, Ridgway acceded to the application. The bills drawn upon this occasion, and accepted by Ridgway were three in number; one of those—a bill for 984*l.* 6*s.* 10*d.*—was paid at maturity. The other two bills were renewed, and, as renewed, became due upon the 22nd of June 1841, and were now held by the North Wilts Banking Company. The respective amounts of those two bills were 2,362*l.* 2*s.* 4*d.* and 2,812*l.* 17*s.* 3*d.* In November 1841, the Wilkins' and Pressey proposed to Ridgway, that Pressey should draw upon him a bill of exchange for the balance in his hands, which balance they estimated at 8,500*l.* or thereabouts; and that the Wilkins' should guarantee to the holder of the bill, that the proceeds of the stock and debts at Huddersfield should be appropriated by Ridgway to the payment thereof. To this proposal T. Ridgway assented, upon the understanding that all the stock and debts under his contract should be a security to him for his engagements, whether on account of the Wilkins' alone, or on the joint account of the Wilkins' and Pressey; and it was further agreed that Ridgway should not make any further remittances to the Wilkins' until the bills were paid.

In pursuance of this arrangement Ridgway accepted a bill of exchange for 9,000*l.*, drawn by Pressey, and payable six months after date. In March 1841, a bill of exchange for 400*l.*, drawn by T. Ridgway upon and accepted by the Wilkins', fell due. To provide for this an arrangement was come to between Pressey and Ridgway, in pursuance of which a bill of exchange for 457*l.* 10*s.*, dated the 2nd of March 1841, was drawn by the Wilkins' upon and accepted by Ridgway. The Wilkins' were to provide for this at maturity, and if they should fail to do so, the amount was (in favour of T. Ridgway) to go in part of the

9,000*l.* bill. The bill for 457*l.* 10*s.* was not paid at maturity, and the amount was still unpaid. The holders of this bill were Richard Sanderson, William Morris, and Richard Guard.

In or about the month of April 1841, a bill of exchange for 789*l.* 10*s.*, drawn by the Wilkins' upon and accepted by T. Ridgway, also fell due. To provide for this and for some other purposes an arrangement was come to between the Wilkins', Pressey, and Ridgway, in pursuance of which the Wilkins' drew a bill of exchange upon Ridgway, to the joint account of the Wilkins' and Pressey, for 938*l.* 17*s.*, which Ridgway accepted. This bill was unpaid at the time of Wilkins' bankruptcy. The Union Bank of London were then and are now the holders of this bill, and they are creditors for the full amount less 141*l.* 14*s.* 10*d.*, which they had in their hands, as the bankers of the Wilkins'. The Master found that the Union Bank of London refused to make any advances upon this bill until they were assured by H. Wilkins, on behalf of himself and John, and also by Ridgway, that the wools and money owing for the wools, in the hands of or payable to Ridgway generally, was sufficient to provide for the bill.

In May 1841, a fiat in bankruptcy issued against the Wilkins', and they were duly found bankrupts. Their assignees were George Lackington, the official assignee, and the defendants, William H. Goschen and Charles Windeler, the creditors' assignees. Lackington was since dead, and Johnson had been appointed assignee in his place.

Shortly after the bankruptcy of the Wilkins', their assignees gave notice to the persons to whom Ridgway had sold the wools not to pay the proceeds of the sales to Ridgway. In consequence of this, an arrangement was come to by the persons interested, in pursuance of which an indenture, dated the 11th of June 1841, was made between Tristram Ridgway of the first part, William Henry Goschen and Charles Windeler (the assignees in bankruptcy of Henry and John Wilkins) defendants, of the second part, and James Laycock and William Quitter (the plaintiffs,) of the third part, whereby, after reciting that Ridgway had for many years sold wool in his own name, by commission, for the said H. Wilkins and J. Wilkins, and also reciting that the several persons mentioned in t dule thereunder written together amounts set opposite to their re names, were the persons who were to Ridgway as such agent as there tioned, and also reciting, that, pre the date of the bankruptcy of H. and J. Wilkins, Ridgway had rec authority in writing from them to priate the wools belonging to them his hands, and the proceeds of t thereof as well as the outstanding the first place, to meet certain acc which Ridgway had then agreed and, after reciting that H. Wilkin Wilkins had given notice to the mentioned in the schedule thereunc ten not to pay their debts to R and also reciting, that in order to matters in dispute it had been agr an action at law, which had be menced against T. Ridgway by signees of H. Wilkins and J. Wilkin be discontinued, and the notices debtors should be withdrawn, and several debts mentioned in the thereunder written should be assig the purposes thereinafter menti was witnessed that for the consid therein mentioned, Goschen and W did thereby covenant with Ridgw the action should be discontinued, notices withdrawn; and it was by denture further witnessed, that, i deration of the covenant entered Goschen and Windeler, he, Ridgw with the privity and consent of and Windeler, assign unto the all those several debts mentioned schedule thereunder written, to he the plaintiffs, their executors, and istrators, upon the trusts and for poses therein mentioned; and Ridg thereby constitute and appoint the his true and lawful attornies, to mand, and get in the debts, and give for the same as effectually to all int purposes as he, Ridgway, might ha he ratifying and confirming all th The trusts were declared to be " assignment so made as therein mentic made to the plaintiffs, their execut administrators, upon trust that they apply the money to be received fi debts, in the first place, towards pa

expenses of the indenture and any other expenses incurred in the execution thereof, and upon trust in the next place to apply the money in the same manner as Ridgway would be entitled by law to apply the same, in case the then present assignment had not been executed." The plaintiffs in the cause were the trustees of the deed of assignment. At the time of filing the bill the first-named defendant, George Lackington, (since deceased) was the official assignee, and the defendants Goschen and Windeler were the creditors' assignees under the bankruptcy of H. Wilkins and J. Wilkins. At that time also the defendants John Drewett and Frederick Mould (since deceased) were the creditors' assignees of Ridgway the bankrupt; and Patrick Johnson was now the official assignee of both estates. The two sets of assignees were the defendants to the bill. The plaintiffs, by their bill, admitted that the sum of 5,899*l.* 4*s.* 8*d.* was in their hands; and the bill suggested, amongst other things, that three debts, not included in the schedule, amounting together to 872*l.*, but which debts were included in the balance admitted to be in the plaintiffs' hands, were by mistake omitted from the assignment of the 11th of June 1841. It stated, also, that the debts not received were irrecoverable; and it prayed in effect that the trusts of the deed of assignment might be executed under the direction of the Court.

In May 1841 Pressey ceased to act as the agent for the Pollaks. The Pollaks had caused the accounts between themselves and Pressey to be investigated; the result of which was that a large balance (alleged by the Pollaks to exceed 12,000*l.*) was found due from Pressey to them. Upon this, Pressey delivered to the Pollaks the 9,000*l.* bill, and was credited with the amount supposed to be due upon it. The bill was at first indorsed generally by Pressey, but after it had arrived at maturity it was again indorsed as follows:—"Pay J. Pollak or order." Jacob Pollak, on behalf of himself and David, was now the holder of this bill, and the amount claimed upon it was 6,289*l.* 18*s.* 6*d.* and interest. The results respecting the bills accepted by Ridgway were these:—First, that after allowing for payments made by Ridgway (out of the proceeds of the wools) in respect of the two bills for 2,812*l.* 17*s.* 3*d.* and 2,362*l.* 2*s.* 4*d.* respectively, there remained due upon those bills 4,532*l.* 9*s.* 4*d.*, principal, and 570*l.* 16*s.* 7*d.* for interest to the 23rd of January 1845, and subsequent interest upon the principal money since that day. The holders of these bills were the North Wilts Banking Company. Secondly, that after allowing for payments made by Ridgway (out of the proceeds of the wool in his hands) in respect of the 9,000*l.* bill, there remained 6,279*l.* 6*s.* 1*d.*, subject to such further reductions (if any) as the assignees of Ridgway had a right to make in respect of the two bills for 457*l.* 10*s.* and 973*l.* 17*s.* and interest. The Pollaks were the holders on this occasion. Thirdly, there was a bill for 457*l.* 10*s.*, then due, in the hands of Sanderson, Morris, & Guard. Fourthly and lastly, there was 973*l.* 17*s.*, then reduced to 832*l.* 2*s.* 1*d.*, by the application of the balance of 141*l.* 14*s.* 11*d.*; and that bill was then in the hands of the Union Bank of London.

All the above bills were drawn and accepted, generally, against all the wools in the hands of Ridgway, on the account of the Messrs. Wilkins and Pressey, whether on their joint account or on the separate account of each of the parties.

The bill having been filed, and the answers put in, the cause came on to be heard on the 11th of July 1844, and from the frame of the bill (which was in effect an interpleading bill) being filed by the trustees, nothing could then be decided, as no issue was joined between the co-defendants, the parties really interested; and the Court, therefore, directed such steps to be taken as would enable the co-defendants to litigate *inter se* such questions as they thought proper to raise by their respective answers. Accordingly, by the decree, on the 11th of July 1844, which was a decree taken by the consent of the parties, "it was ordered that the plaintiffs should, on or before the 31st of December 1844, pay into the Bank, with the privity of the Accountant General, to the credit of the cause, 5,899*l.* 4*s.* 8*d.*, admitted to be in their hands, together with all such further sums, by way of interest upon the amount of the principal; the interest to be verified by affidavit." Then it was ordered that the money, when paid in, should be laid out in the purchase of 3*l.* per cent. consols.

Then it was ordered, that the interest then due or to accrue due on the Bank annuities so to be purchased, and all accumulations thereof, should be laid out in the purchase of 3*l.* per cent. consols in the usual way; and it was referred to the Master in rotation to take an account of the debts and monies which were comprised in and assigned by the indenture of the 11th of June 1841 in the pleadings mentioned; and also an account of all and every the sums and sum of money received by or come to the hands of the plaintiffs, or either of them, or any other person or persons by their or either of their order, or for their or either of their use under the same indenture, or otherwise, and of their application thereof; and in taking the account the plaintiffs were to receive credit for 5,899*l.* 4*s.* 8*d.* and interest as aforesaid, to be so paid into the Bank as aforesaid, or so much thereof as the Master should find to have been comprised in and assigned by the indenture. And it was ordered, that the Master should also inquire and state to the Court which of the debts or monies which he should find to have been comprised in and assigned by the indenture were or was then outstanding, and under what circumstances, and whether the same and any and what portion thereof were or was then recoverable, and whether it would be fit and proper and for the benefit of the parties interested that any and what proceedings should be taken, and against whom, for the recovery thereof or of any and which of them. And it was ordered, that the Master should inquire and state to the Court whether any and what bills of exchange were accepted by Ridgway in the pleadings mentioned, and at whose request and for what account and for what purpose, and whether the same were drawn and accepted against the wools in the pleadings mentioned generally, or against any particular part or parts thereof, and if so, against which of such wools, and how much had been paid, by whom and out of what funds, on account thereof, and what amount then remained unpaid, and when the same bills respectively were accepted, and what persons or person were or was then the holders or holder of such unpaid acceptances or acceptance. And it was ordered, that the Master should inquire and state to the Court whether any and what money was due to T. Ridgway at the t his bankruptcy from the said H. and J. Wilkins, or their estate, spect of his general account as t tor of H. and J. Wilkins. And ordered, that the Master should a quire and state to the Court in of what debts or sums of money t of 872*l.* part of the sum of 5,899*l.* in the pleadings stated to have b ceived by the plaintiffs from Ri became due, and whether the debts of which the same consisted, or a which of them, or any and wha or part thereof were or was intende comprised in or to be assigned indenture of assignment of the 11th 1841. And it was ordered, that the in taking the account before directed make to the plaintiffs all just allow respect of any costs, charges and e properly incurred by them (other t except the costs of this suit), in rel the execution of the trusts of the in of the 11th of June 1841. And for t poses of making such inquiries, ordered that the Master should be at if he should think fit, to cause ad ments to be published in the *Gazette*, and such other public pape should think fit, for the persons clai be holders of such bills of exchang should find to have been accepted b way as aforesaid, to come in and m their claims before him, and he was peremptory day for that purpose. the better taking of the accoun making the inquiries, the parties produce upon oath all deeds, books, and writings in their custody or relating thereto, and were to be ex upon interrogatories as the Master direct, who, in taking such accounts make unto the parties all just allo And the Master was to be at lib state any special circumstances request of any of the parties; and directions were reserved.

The Master did issue advertisem the bill-holders to come in, and the found, first, that the persons who were the North Wilts Banking Co who brought in a state of facts, North Wilts Banking Company wer sented by Jeffreys, their public

secondly, David and Jacob Pollak of Vienna; thirdly, the Union Bank of London by Sir Peter Laurie, Mr. Spottiswoode and others, the trustees of the banking company; fourthly, Richard Sanderson, William Morris, Richard Guard and Patrick Johnson and John Drewett, as to the amount due to Tristram Ridgway at the time of his bankruptcy from the Wilkins'. In fact, all these persons came in and carried in states of facts and charges, and brought in their evidence and had their cases considered before the Master.

The Master, by his report, dated the 23rd of March 1847, found the amount of the money paid in with which he charged them; and he found other amounts making together the sum of 6,207*l.* 4*s.* 11*d.*—he found that that sum had been paid in—he found that 4,612*l.* 18*s.* 10*d.* then remained outstanding, amongst the debts included in the schedule; but that they were either irrecoverable or desperate debts, and that it would not be of any use for the parties to take steps for the recovery of the same. And as to the inquiry directed by the decree whether any and what money was due to Ridgway at the time of his bankruptcy from either Messrs. Wilkins or their estate in respect of his general account as factor, the Master found that the sum of 9,208*l.* 11*s.* 1*d.* was claimed by the assignees of Ridgway as due to them from the estate of the said H. Wilkins and J. Wilkins, but that such claim was disputed, and that a balance was claimed by the assignees of H. Wilkins and J. Wilkins as being in fact due to them from the estate of Ridgway; and the accounts between the parties extending over a long period of time and being of a complicated character, it was submitted to the Master on the part of the defendants, the assignees of Ridgway, that inasmuch as such accounts for the most part did not affect the fund to be administered in this suit, it was unnecessary to incur the expense and delay of investigating them; and the several other parties interested having consented thereto, the Master forbore to make the inquiry by the decree directed as to the amount (if any) due to Ridgway at the time of his bankruptcy from H. Wilkins and J. Wilkins or their estate, in respect of his general account in trust for the Wilkins'.

The Master also found that the 872*l.* was omitted by mistake, and was intended to have been included, and should have been included, in the assignment of the 11th of June 1841, and that at the instance of the Pollaks, who were not parties in the cause, he had found certain special circumstances. The report was confirmed, and the case came on to be argued on further directions on the 24th and 25th of May last.

The holders of the different bills appeared at the hearing on further directions to support their case, as made before the Master.

Mr. Swanston and *Mr. Rolt*, for D. & J. Pollak, claimed to be entitled to have the bills in their hands satisfied out of the proceeds of the wool under the equity established by the case of *Ex parte Waring* (1). They cited also—

Ex parte Parr, Buck, 191.
Ex parte Perfect, Mont. 25.
Ex parte Hobhouse, 2 Dea. 291; s. c. 6 Law J. Rep. (N.S.) Bankr. 76.
Ex parte Downes, 18 Ves. 290; s. c. 1 Rose, 96.
Ex parte Solomon, 1 Gl. & Jam. 25.
Ex parte Eggington, Mont. 72.

Mr. Follett, for Sanderson & Co., the holders of the 450*l.* bill.

Mr. Anderson, for the North Wilts Banking Company.

Mr. Wood, for the assignees of Ridgway, objected that the bill-holders had no right to appear and argue, as they were no parties to the bill; and the sole question to be decided in the cause was as between the assignees of T. Ridgway on the one hand and the assignees of the Wilkins' on the other; and that the Court could do no more than order the amount of the trust funds to be paid over to the estate found entitled to it; and that the assignees of Ridgway were clearly in a position to claim the whole amount.

Mr. Walford, for the assignees of the Messrs. Wilkins.

June 5.—WIGRAM, V.C.—The only point I had to decide was, whether the bill-holders had a right to appear on the further directions, and argue, in support of their claims, to have the proceeds of the wools

(1) 19 Ves. 345.

applied in payment of the bills in their hands; or whether they were not so entitled; and if they were entitled to appear, then whether an order ought to be made out in their favour or not.

Counsel, upon further directions, appeared on behalf of the bill-holders, and claimed a right to be heard, on the further directions, in support of the claim to have the proceeds of the wools applied in payment of the bills in their hands. The right of the bill-holders so to appear was controverted by the parties in the cause, as was also the interest they claimed in the proceeds of the wools. My opinion is, that the bill-holders have not a right to be heard in this cause upon further directions. The interests of the parties under the assignment of the 11th of June 1841, cannot be affected by the form of the suit. Their interests must be dealt with precisely in the same way as they would have been dealt with if one set of defendants had been plaintiffs, and the other set with the trustees had been defendants.

Now, suppose, in the first place, there had been no bankruptcy, and that Messrs. Wilkins had been plaintiffs, and Ridgway, with the trustees, defendants, asking the decision of the Court as to the rights under the deed of assignment. In that case, no bill-holder would have been a necessary or proper party to this suit. I mean to say, that the effect of that deed, however it might give the Wilkins' and Ridgway a right to say the proceeds should be applied to the benefit of the bill-holders, it was an interest the bill-holders only took by the contract between those parties. The bill-holders could not have intervened and filed a bill upon the footing of the deed to have the proceeds so applied. I merely mention that as a stepping-stone to the further observations which I have to make; because it was not argued at the bar that they could. It was admitted by counsel at the bar, that without the bankruptcy the bill-holders could not appear. It would have been unnecessary to dwell upon that, had it not been that the Union Bank of London had been there. There was some communication with them respecting the application of the proceeds, and that was not relied upon at the bar, nor upon the Master's finding, I think. Assuming, at present, that they could not have intervened, if there were no bankruptcy, the next point is this, taking the bankruptcy as a fact in the case, suppose the assignees of Wilkins to have been plaintiffs, and the assignees of Ridgway, together with the trustees, defendants; in that case, (omitting for a moment the doctrine established by the case of *Ex parte Waring*, and the other cases cited at the bar,) the case would be the same as before. The assignees in each case standing in the place of the bankrupts, and representing all the creditors, the fund would be attributed by the Court to the estate entitled to it, and the fund having been given to the proper bankrupt's estate, would be distributed by the assignees in the bankruptcy.

The third question is, does the doctrine established by *Ex parte Waring* and the other cases, make any difference? It appears to me to make no difference for the purposes of the present suit. The creditors must be paid in the bankruptcy, and the rule laid down in *Ex parte Waring* is only a special mode of payment in the bankruptcy. And in the case of *Thompson* v. *Derham* (2), I had occasion much to consider (and the Lord Chancellor afterwards approved of that decision,) what the consequences would be, if the Court took upon itself to administer in equity the law which applies to the bankruptcy alone; and it appears to me in that case, that if I were to attempt to administer the bankrupt's estate, I should be incurring in substance many inconveniences to which I ought not to subject the parties. In truth, the application of *Ex parte Waring* is merely a special mode of paying the creditors, where they could bring the case within that rule.

Now, the fourth and last question belonging to this part of the subject is this: —Does the form of the decree make any difference? The only question, as it appears to me, that can arise upon that is a question arising upon the direction in the decree as to the advertisements. All the inquiries, all the directions in the decree except those connected with the advertisements, would be strictly necessary for the purpose of adjusting the rights of the assignees as between each other. If the direction to advertise

(2) 1 Hare, 358; s. c. 13 Law J. Rep. (N.S.) Chanc. 351.

were not necessary for that purpose, it certainly is not so foreign to it as to justify the conclusion on my part, that the direction contained in the decree was intended to confer, and has conferred, upon the bill-holders, who are not parties in the cause, an interest in the suit, such as they otherwise would not have had. Excluding then the bill-holders, the question is between the assignees of the two estates of the bankrupts; and if the transactions between the Messrs. Wilkins & Ridgway had been confined to the particular wools represented by the money in court, and the particular bills mentioned in the report, the decree would necessarily be to give the proceeds to the assignees of Ridgway, to be by them administered in the bankruptcy. I say this, because the amount to be paid on the bills exceeds the amount of the wools in their hands. It was said by Mr. Walford, for the assignees of Wilkins, that there were other transactions between the bankrupts, and that until the state of the general account between them at the date of the bankruptcy was known, the proper decree to be made as between the estates of the two bankrupts could not be known.

I have referred to the answers of the defendants, for the purpose of seeing what case they make. It appears by the answer of Ridgway, that he claimed a balance to be due to him on the general account, and claimed by the general law of factors a right to apply any proceeds in his hands for the payment of any balance that might be due from the Wilkins' to him. No such case as this is made in the answers of the assignees of Messrs. Wilkins.

At the hearing of the cause, the order made was according to the rights of the parties; and the decree directs an account to be taken of what is due to Ridgway from the Wilkins' at the date of the bankruptcy, but does not contain any counter direction to take an account of what, if anything, was due from Ridgway to them; shewing at all events that the state of the account was as Ridgway stated. In the Master's office, however, it appears that claims were made by both parties; but both parties agreed, for the purpose of adjusting their rights in respect of their wool, that the account should not be affected by taking the accounts of any transactions except those directly connected with the wool, and the bills drawn against them; and, accordingly, the Master, by consent of both parties, abstained from adopting the account. I am quite satisfied that there could be no injustice done by taking that course. The only question that remains is, whether there may not be claims upon the wool or the proceeds of the wool, by persons who are not parties to the record.

Now, with respect to that arrangement, it has not been suggested to me that there are any such claims, although the persons who would be entitled to make them would have notice, except Pressey. I do not know how that is. It appears to me, that the proper decree to be made on this record is a decree for payment to the assignees of Ridgway of the balance in court, subject of course to the question of costs, without prejudice to the claim of any persons who are not parties to the record. The costs of the plaintiff must come out of the fund. But there are two questions of costs that I should wish counsel to speak to on any day that may suit; that is, the costs as between the assignees of the bankrupts, and the costs incurred by the bill-holders. Do they make any claim for costs, because they have been invited to come in, and now having been invited to come in, they are turned round upon, and told they have no interest?

[His Honour was informed that the bill-holders claimed their costs, and it was also urged that the assignees ought to have their costs out of the fund, as this is a suit instituted for the purpose of administering the trusts of the deed.]

WIGRAM, V. C. — The expenses have been incurred in consequence of the bill-holders making a claim which they had no right to make. The deed does not define what the trusts were—they were disputing about their rights. You are disputing before the deed is executed as to whom this property belongs. The assignees of Wilkins say it belongs to them; and Ridgway, or the assignees of Ridgway say it belongs to them, and the deed is executed which decides nothing, but leaves the Court to decide what the rights of the parties were independent of the deed; and having got the benefit of that fund, the parties come to litigate as to it: and why should the unsuccessful party have his costs?

June 8.—WIGRAM, V.C., after hearing the parties upon the question of costs, said, that the inquiries and the direction as to the advertisements, were necessary for the decision of the suit; but as he had already decided that they, the bill-holders, had no right to be heard, or to have the fund paid over to them, he could not give them their costs, and should not make them pay costs. The plaintiffs' costs to come out of the fund.

WIGRAM, V.C.
May 1, 3;
June 10.
} ENO *v.* ENO.

Devise—Remoteness—Failure of Issue—Deed, Construction of.

Testator, by his will, dated in 1778, *gave all his real estates to his son-in-law, J.R, for life, with remainder to his daughter M.R, for life, with remainder to the first and every other son of his daughter in tail male, with remainder to the daughters of his daughter in tail general, with cross remainders between them; and for default of "such" issue, he gave his daughter an absolute power of appointment over the whole property. In* 1841, *the daughter, M.R, by deed-poll, duly executed according to the power, reciting accurately the limitations of the will, and that there was no issue of her body, and that she was desirous of exercising the power given her by the will, appointed that the devised property should go, "subject to the life estate of J.R. and M.R. therein, and there being a failure of issue of the said M.R," to the use of the plaintiff in fee:—Held, that this was a valid appointment to the plaintiff; the words "failure of issue" being, with reference to the previous recital that she had no issue of her body, to be construed as a failure of "such issue." The same rule of construction would prevail as well in a deed as in a will.*

James Mackerill, by his will, dated the 26th of August 1778, duly executed and attested so as to pass freehold estates, after charging all his real estates with the payment of an annuity of 35*l.* to his wife, Bridget Mackerill, (since deceased) for her life, and after charging a certain part of his real estates with an annuity, or yearly rent-charge of 40*s.*, for the purposes therein mentioned, gave and devised his real estates therein mentioned, (and which comprised the several hereditaments contracted to be purchased by the defendant, and certain hereditaments in respect of which certain allotments were made) subject to the said several annuities, unto his, the said testator's son-in-law, John Read, for and during the term of his life; with remainder to trustees, to preserve contingent remainders, with remainder to his the said testator's daughter Mary, the wife of the said J. Read, for and during the term of her life, with remainder to trustees to preserve contingent remainders, with remainder to the first son of the body of his said daughter, begotten, or to be begotten, and the heirs male of the body of such first son, lawfully issuing, with remainder to the second, third, fourth, and all and every son and sons of the body of his said daughter, severally and successively in tail male, with remainder to all and every the daughter and daughters of the body of his said daughter Mary, as tenants in common, in tail, with cross remainders between or amongst them; and for default of *such* issue of his said daughter, the said testator willed and directed, that it should be lawful to and for his said daughter, whether covert or sole, by any deed or writing, by her sealed and delivered in the presence of three or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be her last will and testament, and by her signed and published in the presence of the like number of witnesses, to give and devise the same premises, and every part thereof (subject as aforesaid,) to such person and persons, for such estates and estate, uses, trusts, intents and purposes, and charged and chargeable with such sum or sums of money either annual or in gross, as his said daughter should think proper.

By a deed-poll, bearing date the 8th of April 1822, and sealed and delivered by the said Mary Read, in the presence of and attested by three witnesses, after reciting fully the said will of the said J. Mackerill, and that the said J. Mackerill died without altering or revoking his said will, and reciting as follows:—"And whereas the said M. Read has not

any issue of her body; and whereas the said M. Read did, many years since, in pursuance of the said power to her given by the said hereinbefore in part recited will appoint a small piece or parcel of land, therein particularly devised, and part of the premises so devised by the said will as aforesaid, to the purchaser thereof; and whereas the said M. Read is desirous of exercising the power of appointment as to all and singular the said lands and hereditaments devised by the said hereinbefore in part recited will of the said J. Mackerill, and which have not been already so appointed by her the said M. Read, as aforesaid, subject to the life interests of the said J. Read and Mary his wife, respectively, in the said premises, in manner hereinafter mentioned;"—it was witnessed, that, for effectuating such the desire of the said M. Read, and pursuant to, and by force and virtue, and in exercise and execution of the power or authority to her for this purpose given or limited by the hereinbefore in part recited will of the said J. Mackerill, and of every or any other power or authority in anywise enabling her in that behalf, she, the said M. Read, did, by the then present deed or writing, by her sealed and delivered as aforesaid, direct, limit, and appoint, that from and after the decease of the survivor of the said J. Read and herself, the said M. Read, and *there being a failure of issue of the said M. Read*, all and singular the said messuages, lands, tenements, and hereditaments, devised by the said thereinbefore in part recited will of the said J. Mackerill, and which had not been so appointed by the said M. Read as thereinbefore was mentioned, and all lands and hereditaments which had been theretofore set out, allotted and awarded by the commissioners for the inclosure of the commons, in respect of rights of common appertaining or appurtenant to the said messuages, lands, tenements and hereditaments, or any part thereof, with their and every of their rights, members, and appurtenances, should, subject to the said annuity of 40*s.* charged by the said will upon part of the said hereditaments as thereinbefore was mentioned and recited, go, remain, and be unto and to the use of John Eno, of &c., his heirs and assigns for ever.

Upon the death of Mary Read, John Eno entered into the possession of the property so appointed to him as aforesaid, and subsequently contracted for the sale of the same to the defendant in the cause. The present bill was filed by the vendor for specific performance of the contract; and two questions were raised: first, whether the appointment to the plaintiff was not too remote as being after a general failure of issue of Mary Read; and if so, secondly, whether the plaintiff was not entitled under a will of Mary Read of earlier date.

Mr. Romilly and *Mr. Metcalfe*, for the plaintiff, contended that the appointment to the plaintiff on failure of issue of Mary Read must be read in connexion with the previous recital "that there was a failure of issue of the *body*," and that the Court would construe it as "*such* issue"—*Morse* v. *Lord Ormonde* (1), *Egerton* v. *Jones* (2), *Ellicombe* v. *Gompertz* (3) overruling the cases of *Bristow* v. *Boothby* (4) and *Bankes* v. *Holme* (5). And that such construction would prevail as well in the case of a deed as of a will—*Wright* d. *Burrill* v. *Kemp* (6), *Doe* d. *King* v. *Frost* (7).

Mr. Wood and *Mr. Smith*, for the defendant.

The following cases were cited as to the deed being a revocation of the earlier will—

Ex parte the Earl of Ilchester, 7 Ves. 348.
Eilbeck v. *Wood*, 1 Russ. 565.
Lock v. *Foote*, 5 Sim. 618.
Matthews v. *Venables*, 2 Bing. 136; s. c. 9 Moore, 286; 2 Law J. Rep. C.P. 124.
Simpson v. *Walker*, 5 Sim. 1.

June 10.—WIGRAM, V.C.—The first question is as to the appointment. The deed-poll recites correctly the estates created by the will of James Mackerill, and thereby avoids the difficulty existing in the case of *Bankes* v. *Holme*, notwithstanding the cases of *Morse* v. *Lord Ormonde* and *Eger-*

(1) 5 Mad. 99; s. c. 1 Russ. 382; 4 Law J. Rep. Chanc. 158.
(2) 3 Sim. 409.
(3) 3 Myl. & Cr. 127.
(4) 2 Sim. & Stu. 465; s. c. 4 Law J. Rep. Chanc. 87
(5) 1 Russ. 394, n.
(6) 3 Term Rep. 470.
(7) 3 B. & Ald. 546.

ton v. *Jones*. The deed then proceeds to state, that Mary Read had not any issue of her body, and was desirous of executing the power of appointment given to her by the will; and in pursuance of that power, she appoints that after the decease of the survivor of the said J. Read and herself, and there being a failure of issue of the said Mary Read, the said estates shall go to the use of John Eno, his heirs and assigns. The objection raised is, that the appointment was to take effect after a general failure of issue of Mary Read. The estate was so given by the will as not to give any interest to female issue of any son of Mary Read. In considering this point the question is, whether the present state of the authorities is not such that I must hold the appointment to the plaintiff valid. To try this, I will begin by supposing that the estate limited to the issue of Mary Read had been limited by Mary Read herself, as the owner of the fee, and that the limitations to the plaintiff were the same, and that there were no recitals. Upon this hypothesis, without saying that the title would be such as the Court would compel a purchaser to take, I am strongly of opinion that the appointment would have been valid. The question is, whether the appointment is to be read as appointing the estate to the plaintiff in default of issue generally, including female issue, or in default of such issue as the testator had made provision for; until failure of which issue upon the present hypothesis no estate is given.

It is scarcely possible to doubt what the construction would be; nothing would be more irrational than supposing the donee to be creating an estate, and then capriciously postponing the interest of the appointee, to an event which might never happen. The question, however, is, whether the inference arising from the literal construction is sufficient for me to say that such was the intention of Mary Read.

The case of *Morse* v. *Lord Ormonde* is a direct authority as to the validity of the appointment. Lord Eldon's observations at 1 *Russ.* 405, appear to me clearly to shew the true principle of construction, that a gift to children in tail, not taking in female issue, followed by a limitation over, in terms, on failure of issue generally, must *primâ facie* be taken to mean suc before mentioned, unless it appea other issue were intended to take. case, Sir John Leach appeared to rel the term of years. Lord Eldon d notice that in his judgment, but g the indefinite failure of issue, meani issue before mentioned. *Ellicombe* v *pertz* is a strong authority for th proposition; and however guarded t guage of the Lord Chancellor may cannot read the passage in 3 *Myl.* 151, without being persuaded tha simple case like that which I am no posing, he would decide, unless the c led to a different conclusion, that th "issue" meant such issue as were de in the previous limitations. The rities upon the question, as referring sonalty, are collected in *Jarman on* vol. 2. p. 361, as to personalty; p. 368, as to real estate; edition 18 do not refer to the other cases. I can think the authority of *Bristow* v. *Bo* shaken, if not destroyed, by the deci *Morse* v. *Lord Ormonde*, unless, inc is to be supported by the distinctic in that case the question depended construction of a deed.

But can any sound distinction, h be taken between a deed and a will f poses like the present? That is, wo conclusion be different on the same thesis, supposing the difference only that the entire disposition was in a instead of a will? The observations c Kenyon, in *Wright* v. *Kemp*, are de also of all possible attention. In th Lord Kenyon, after observing that render was a common law conve says, "certain legal phrases are ne to create estates, but beyond that, t no magic in particular words furth as they shew the intention of the p In order to give effect to the surren used "or" for "and," and said the no difference between a will and a It was said, indeed, that Mary Read in this case have intended to res power to appoint to female desce of sons; but as Mary Read is tioned as a married woman in th of James Mackerill, dated in 1778 impossible to sustain that conjecture three years after the time when sh

spoken of as a married woman. If, therefore, the limitations were such as I first supposed, the appointment is valid, and the whole disposed of, whether the limitations were created by deed or will. But the case does not rest here. There are, in this case, circumstances to shew that I have put the right construction upon the will. A doubt might exist whether the omission of the female descendants of the male issue was not by mistake; and that in the case of a party providing for her own issue, it would be better to adhere to the letter of the will, and give to the female descendants of male issue, not provided for, the chance of an intestacy, rather than the property should go over to a stranger. In this case there is no place for such a conjecture, but James Mackerill, where he creates the limitations, not extending to daughters of male issue, gives the power, after failure of such issue; and Mary Read, the donee of the power, exercises that power so given to her without giving anything to issue not provided for by the will. I cannot think there was any mistake as to the omission of female descendants of male issue. The deed-poll, after reciting that there was no isue of the body, directs that, subject to the life interest of J. Read and Mary his wife, and there being a failure of issue of Mary Read, the premises should go to the plaintiff in fee. I am of opinion that in a case so circumstanced, those words must be read with reference to the previous recital, and will apply to issue living at the death of herself and her husband; and that not only the title is good, but such as the Court ought to require a purchaser to take. It is unnecessary to go into the other question as to the revocation.

WIGRAM, V.C. June 25, 26; July 13. } SAY *v.* CREED.

Will—Construction—Bequest to Testatrix's Next-of-kin after a Life Interest—Period of ascertaining the Class.

Testatrix, by her will, gave all her real and personal estate to trustees, upon trust, as to the personal estate, to call in and convert and invest in government or real securities, and to pay the rents, dividends and profits of her said real and personal estate to her mother for life, remainder to her sister L. B. for life, and from and after the decease of the survivor of them, upon trust, to sell all her real estate, and the money arising therefrom, together with all rents and profits, from the last payment made to the survivor, to be paid by the trustees, after deducting all costs, &c., unto such person or persons as she should by any codicil bequeath the same; but in case she should not by any codicil bequeath the same monies, she directed that the same should be paid by her said trustees unto and amongst her next-of-kin, in a due course of administration as the law directed in respect of the intestate's personal estates. By a codicil she revoked the bequest after the life estate, and directed that the "said residue" should be paid to her next-of-kin on the part of her said mother only, and not to any of her next-of-kin on the part of her then late deceased father.

At the death of the testatrix, L. B. was her sole next-of-kin both ex parte paternâ *and* ex parte maternâ :—*Held, that the next-of-kin* ex parte maternâ *of the testatrix living at the death of L. B. (excluding L. B.) were entitled to the residue of the proceeds of the real estate; and that the residue of the personal estate, subject to the life interests therein given, was undisposed of by the will and codicil.*

Catherine Ashley, the testatrix in the cause, by her will, dated the 25th of June 1815, devised all her real estate to J. T. Dering and W. Williams and their heirs, upon the trusts thereof thereinafter declared; and bequeathed to the same trustees, their executors, administrators and assigns, all her personal estate, subject to the payment of her debts and legacies, upon trust, to convert the personal estate into money, and to invest the same upon government or real securities. And the said testatrix declared that her said trustees should stand possessed of her said real and personal estate, upon trust, to pay the rents, issues, and profits thereof unto her mother, Catherine Ashley, for her life; and from and after the decease of her said mother, upon trust, to pay the same rents, issues and profits unto her sister, Lucy Brown, for her separate use;

and from and after the decease of her said sister, the said testatrix directed and empowered her said trustees to make sale and dispose of, and to convey and assure to the purchaser or purchasers, all and every her said real estates so as aforesaid devised to them, for the most money that could be had or gotten for the same; and that the money arising therefrom, together with all the rents and profits thereof from the last payment made to the survivor of her said mother and sister, should be paid by her said trustees, after deducting all costs and charges attending the execution of the trusts thereby in them reposed, unto such person or persons, and in such manner and form, to whom she should by any codicil or codicils, note or memorandum, give or bequeath the same; but in case she should not by any codicil, note or memorandum, give and bequeath the same monies, or not thereby give and bequeath or dispose of the whole thereof, then she did will and direct that the same, or such part thereof as should not be given, bequeathed, or disposed of, should be paid by her said trustees unto and amongst her next-of-kin in a due course of administration as the law directed in respect of intestate personal estates. And she appointed the said J. T. Dering and W. Williams executors of her said will. The said testatrix, by a codicil to her said will, dated the 20th of May 1818, reciting the said devise and bequest, in trust, by her said will made to Dering and Williams, revoked the same, and devised and bequeathed all her real and personal estate unto the said J. T. Dering and Henry Say, their heirs, executors, administrators and assigns, upon the like trusts, as in her said will were mentioned and declared of and concerning her said real and personal estates. And the said testatrix did thereby revoke and declare, that, in case she should not make any further codicil to her will, and dispose of the residue directed by her said will to be paid to her next-of-kin, she did thereby will and direct that all "the said residue" should be paid to her next-of-kin on the part of her said mother only, and not to any of her next-of-kin on the part of her then late deceased father; and she did thereby ratify and confirm in all other matters her said will, save and except that she did thereby constitute the sai together with J. T. Dering, to b of her said will and codicil, in th the said W. Williams. Catherin the mother, died in the lifetime c tatrix, and the testatrix died in 1838, and her said will and co proved by the said J. T. Dering an Lucy Brown died in June 1843 and letters of administration of and effects were granted to the sai who, as surviving trustee, unde and codicil of the testatrix, sol estate. In February 1844, th bill was filed by the said H. Sa that the trusts of the said will a might be carried into execution, the rights of the plaintiff and all ties (if any) in the said residuar estate, and the proceeds of the estate, might be declared. Th claimed as the administrator of Lu who was the only sister and n of the said testatrix, and also her of-kin on the part of her mother a of the death of the testatrix, to l to the whole of the residuary pers and the proceeds of the real est defendants, the Rev. H. Creed, W and C. Goodwin, claimed as the of the Rev. Philip Bell, the mate of the testatrix, and who, exce next after Lucy Brown, was the of-kin on the part of the mother testatrix at the time of her dec they contended, that upon the struction of the will Lucy Brow cluded. The defendant, Edward B Bell and Harriett Bell, the children Bell, deceased, a maternal unc testatrix, and A. Bell, and Anne of Henry Creed, the surviving c the said Philip Bell, and the p the only surviving child of Eliza deceased, a maternal aunt of the tatrix, claimed as the sole next the testatrix on the part of her the death of Lucy Brown; and tended that the next-of-kin inter benefited by the will were such answer that description at the the said Catherine Ashley (the and Lucy Brown. Another que raised, namely, whether the resid sonal estate, subject to the life

therein given, was undisposed of by the will; and if so, that the plaintiff, as administrator of Lucy Brown, was entitled thereto. By the decree at the hearing, inquiries were directed,—first, as to who were the next-of-kin of the testatrix on her mother's side living at the time of her death; secondly, who were such next-of-kin of the testatrix at the time of her death, exclusive of Lucy Brown; thirdly, who were such next-of-kin of the testatrix living at the death of Lucy Brown; and in case all such next-of-kin were parties to the suit, the Master was to proceed to take the accounts. The Master having found that all the said parties were before the Court, and having taken the accounts, the cause now came on for further directions.

Mr. Rolt and *Mr. R. Palmer*, for the plaintiff, the administrator of Lucy Brown, contended that where a testator bequeathed property to his next-of-kin, the ordinary presumption was, that he meant to dispose of it in favour of those to whom the law would give it on the event of intestacy, namely, his next-of-kin at the time of his death. In *Jones* v. *Colbeck* (1) the decision went upon the use of the word "relations" as inapplicable to an only child living at the testator's death, and to whom a previous life interest in the fund had been given. In *Butler* v. *Bushnell* (2) the gift was after the death of the tenant for life, then for such persons who "should" happen to be the testator's next-of-kin; which the Court thought imported another period for ascertaining the class than the testator's death. So also in *Briden* v. *Hewlett* (3) the construction was governed by the word "would." Where the words "next-of-kin" are used *simpliciter*, they are to be understood as next-of-kin according to the statute —*Elmsley* v. *Young* (4), *Pearce* v. *Vincent* (5), *Jenkins* v. *Gower* (6), *Seifferth* v. *Badham* (7).

(1) 8 Ves. 38.
(2) 3 Myl. & K. 232; s. c. 3 Law J. Rep. (N.S.) Chanc. 139.
(3) 2 Ibid. 90; s. c. 1 Law J. Rep. (N.S.) Chanc. 114.
(4) 2 Myl. & K. 82; s. c. 3 Law J. Rep. (N.S.) Chanc. 17.
(5) 2 Keen, 238; s. c. 7 Law J. Rep. (N.S.) Chanc. 285.
(6) 2 Coll. 537.
(7) 10 Jur. 892.

Mr. Romilly and *Mr. Malins*, for the defendant, Mrs. Creed, one of the three children of Philip Bell, the maternal uncle of the testatrix.—The effect of the will is to exclude Lucy Brown, and then Philip Bell alone answers the description of sole next-of-kin at the death of the testatrix. There is no intestacy of the personal estate after the life estate, for the ulterior trust in the will is of the *said* monies, and in the codicil, of all "the said residue;" and by the recital in her codicil she clearly thought she had disposed of the whole subject of the trust. The following cases were also cited—

Clapton v. *Bulmer*, 10 Sim. 426; s. c. 9 Law J. Rep. (N.S.) Chanc. 261.
Miller v. *Eaton*, 9 Coop. 272.

Mr. Walpole and *Mr. Fleming*, for the representatives of Philip Bell, contended that the next-of-kin were to be ascertained at the death of the testatrix, but that Lucy Brown was to be excluded; for the residue was not to go to any of the next-of-kin on the part of the testatrix's father, and Lucy Brown filled the latter character—

Cooper v. *Denison*, 13 Sim. 290.
Poper v. *Whitcombe*, 3 Mer. 689.

Mr. Wood and *Mr. J. V. Prior*, for the next-of-kin of the testatrix at the death of Lucy Brown, cited—

Mentor v. *Wraith*, 13 Sim. 52.
Annesley v. *Cotton*, 16 Law J. Rep. (N.S.) Chanc. 55.

Mr. Chandless and *Mr. Surrage*, for other parties.

July 13.—WIGRAM, V.C.—Two questions were argued before me, first, whether the personal estate of the testatrix is included in the bequest contained in her codicil, to her next-of-kin therein described, or whether the testatrix died intestate as to such personal estate; second, who are the persons entitled under the bequest in the codicil to her next-of-kin, on the part of her mother only, and not to any of her next-of-kin on the part of her father. The case has this peculiarity, that the decision upon either point, strictly taken, may affect the decision upon the other point. This is a decision that, according to the construction

of the will, the testatrix had given the proceeds of the sale of her real estate at her death to the same persons to whom the law would then give her personal estate without any disposition of it, would meet (if, indeed, it did not supersede) the argument founded upon the improbability that the testatrix intended in this case to die intestate as to her personal estate; and again, a decision that the next-of-kin to take under the codicil were the parties answering the description of next-of-kin at the death of Lucy Brown, would leave that argument *(valeat quantum)* in force. In considering the case I have endeavoured to follow the rule to which I shall more particularly advert, of construing the words of the testatrix in their natural and legal sense, and decide the case upon those words, inquiring what the testatrix intended, by examining all parts of the will for the purpose of ascertaining what she has said. For the purpose of trying the question of intestacy, I will suppose, first, the next-of-kin to whom the bequest is made in the codicil to mean next-of-kin living at the death of Lucy Brown. Now, upon that assumption, after repeated considerations of the will and codicil in this case, my conclusion is, that in the will the proceeds of the sale of the real estate only are given "unto and amongst the testatrix's next-of-kin in due course of administration." If so, the gift in the codicil, described as "the residue by my said will directed to be paid to my next-of-kin" cannot be more extensive. That such is the plain, obvious, and grammatical construction of the will, I cannot doubt, unless that meaning can properly be altered or modified by reason of the use of the word "residue" in the codicil.

The proceeds of the sale of the real estate is the last antecedent, and the use of the participle "but" emphatically limits the residue to that. Then as to the use of the word "money" and "monies," it appears that the testatrix generally in her will, when directing a conversion of her property (whether real or personal) says, and says correctly, "to be converted into money," in the singular number, when speaking of the real and personal estate; but that when she speaks of money then existing, she speaks of it as monies: she calls it money in one case generally and monies in the other. The word "money," which used, would not be a correct exp even in legal phraseology; but tl "monies," in the plural number, is according to legal phraseology, whe speaking of money then existing. fess that appears to me much too cr observation to satisfy me that it w a safe guide as to what the testatrix The observations upon the word "1 in the codicil, appeared to me, at o to be more deserving of attention, a ing that the testatrix, by the use of t "residue" in the codicil, expressed v supposed she had done by her will am satisfied that the word is not enough to produce the effect conten The testatrix, in express terms, codicil, sends me back to the will t tain what she meant by the use of t "residue;" and when I look at tl "residue," I find, confining it to estate, what she has given is in t residue. It is given in express ter ject to the payment of certain char expenses, which are directed to be p of the proceeds. If, therefore, I am the words of the will in their str natural sense, it appears to me that no ground whatever for saying that and the codicil go beyond the pro the real estate. Nothing, then, upon this part of the case except th ment founded upon this, that the t has, upon the present assumption, gi residue of her real estate, by her wil next-of-kin living at the death of L. and has left her personal estate to go ing to law amongst her next-of-kin at her own death.

That this, if intended, was capri do not deny; but it is not so capri to justify me in giving to the te language a meaning which it does r If I were at liberty to conjecture, I probably come to a different conc but, in deciding between the claim next-of-kin, who (upon the suppo am now proceeding upon, namely, next-of-kin living at the death of L. were intended) cannot have been pe and individually objects of the te bounty, I have no ground but co for departing from the letter of tl The structure of the codicil favo

eral construction of the words, but I do not can to rely upon that.

The next question for inquiry is, as to the persons who are to take the residue given by the codicil. The question is, whether the assumption I have just made here of is correct or not. The persons who claim are, first, the plaintiff, who claims as representing the sole next-of-kin *ex parte maternâ*, living at the death of the testatrix, although the party whom he represents was next-of-kin also *ex parte paternâ*. The second claimants are the executors of P. Bell, who, if L. Brown had died in the lifetime of the testatrix, would have been her next-of-kin *ex parte maternâ*. The remaining claimants were the only next-of-kin of the testatrix *ex parte maternâ* living at the death of L. Brown. And my opinion is, that the last-mentioned class of persons, that is, the next-of-kin *ex parte maternâ* of the testatrix living at the death of L. Brown, are the persons to whom the property is given. The rule of law, as laid down, and I believe correctly, in modern cases, and particularly in those cases in the Exchequer, is, that the words of the will, in cases of this description, are to be construed in their natural and legal sense, unless, from the context, it appears that they were used in some other sense, or unless the circumstances of the case are such as to exclude that sense. The rule was applied by Sir R. P. Arden, in *Halloway* v. *Halloway* (8), and has since been followed in numerous cases, of which *Jenkins* v. *Gower* and *Seifferth* v. *Badham* (where the principal authorities are collected) are examples; and upon that rule I have repeatedly acted in cases like the present. According to those authorities, where a testator gives property to a tenant for life, and after the death of the tenant for life to his next-of-kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next-of-kin of the testator living at his death will take; and if the tenant for life be such next-of-kin solely or jointly with other persons, he will not on that account only be excluded. This rule is generally admitted; but it must, I think, be admitted, also, that it has been relaxed in some modern cases—1 *Jarman on Wills*, 54, 58. It appears to have been as much relaxed as is safe consistently with the preservation of the rule itself. That relaxation, however, is favourable to my conclusion in this case, although I believe it is not necessary that I should rely upon it. In applying the rule to the present case, the Court is bound, as Lord Brougham observed in *Guy* v. *Sharp* (9), and as has been said in other cases, to place itself in the situation of the testator, and inquire what the testator's words express when used by a person in that situation.

Now, in this case, the will and codicil speak (at the latest) at the death of the testatrix. At the date of the codicil, the father and mother of the testatrix were dead, for she speaks, indeed, of her late father in the codicil. She had no brother or sister living except L. Brown, nor any child of a brother or sister. It was, therefore, of necessity, if L. Brown survived the testatrix, which the testatrix must have contemplated would be the case, that she would be her only next-of-kin living at her death. When, therefore, the testatrix, in such circumstances, described her next-of-kin, to whom she has given her property, in terms which import that she contemplated a plurality of persons under that description, the question is, whether her words, if properly interpreted, do not describe some person or persons other than L. Brown. Without expressing any opinion of my own upon the case of *Jones* v. *Calbeck* (10), decided by Sir William Grant, I may observe, that it is an authority for the proposition that the words must be so interpreted. Again, L. Brown, whom the testatrix, at the date of her will and codicil, knew would be her sole next-of-kin, if she survived her, is tenant for life of the whole of the fund; and although that might be immaterial in cases otherwise circumstanced, as in *Halloway* v. *Halloway*, *Jenkins* v. *Gower*, *Seifferth* v. *Badham*, and the cases there referred to, it has been considered material in a case so circumstanced, *Miller* v. *Eaton*, decided by Sir William Grant. Without giving any opinion upon the case of *Bird* v. *Wood*, it may be observed, that it is a case clearly distin-

(8) 5 Ves. 397.

(9) 1 Myl. & K. 602.
(10) 8 Ves. 38.

guishable from the present upon the direction contained in the will respecting the vesting, upon which the Vice Chancellor principally relied. Another argument against the claim by the other next-of-kin is this,—the testatrix, at the date of the codicil, knew that L. Brown, if she survived her, would be her next-of-kin *ex parte paternâ* as well as *ex parte materna*, yet, in her codicil, in which, for the first time, she distinguishes the next-of-kin one from the other, she describes the objects of her bounty as next-of-kin *ex parte materna* only. It appears to me, that that confirms the construction I have adopted upon the authority of the cases referred to.

Declare that the testatrix died intestate as to the residue of her estate; declare, that the next-of-kin of the testatrix *ex parte materna*, living at the death of L. Brown, are entitled to the residue of the produce of the real estate given by the codicil.

WIGRAM, V.C. June 1. } COCHRANE *v.* WILTSHIRE.

Will, Construction of—Vesting.

A testatrix, by her will, gave the residue of her property to her three sisters; and after their death, to be divided between her four nieces named in her will:—Held, that the gift to the nieces vested immediately upon the death of the testatrix.

Maria Wiltshire, by her will, gave and bequeathed as follows:—" I, Maria Wiltshire, give and bequeath to my sister Savage, the sum of 500*l.*; to each of my nieces, Charlotte, Elizabeth, and Louisa Savage, and Charlotte Wiltshire, the sum of 50*l.*; and likewise to each of my nephews, I give the sum of 50*l.*; and I beg my brother's acceptance of 100*l.*, as a trifling remembrance. The remainder of my fortune, being 7,000*l.*, I give to my sisters Ann, Elizabeth, and Ellen Wiltshire, and after their death to be divided between my nieces above mentioned."

At the death of the survivor of the testatrix's sisters named in the will, three only of the nieces, amongst whom the residuary estate was to be distributed, were living; the fourth survived the testatrix, and married the plaintiff, but died lifetime of the last surviving tenant of the residue.

The bill was filed by the plaintiff personal representative of the decease his wife, against the three surviving named in the will of the testatrix, personal representative of the te claiming a fourth part of the clear the amount of which had been asce and paid into court.

Mr. Tinney and *Mr. Sandys*, plaintiff.—It is clear, upon all the rities, that the interest of the four ni the residuary estate vested upon th of the testatrix, the payment bein poned merely for the benefit of estate. As the three surviving nie raising an adverse claim which is alt without foundation, have rendered necessary, they must pay all the cos

Mr. Romilly and *Mr. Ellison*, representative of the testatrix.

Mr. Walker and *Mr. Geldart*, surviving nieces, contended that wl there was no gift, except in the direc divide after a given event, as in the case, the vesting was postponed u happening of the event, unless fr tenour of the will a different intentio be gathered.

Billingsley v. *Wills*, 3 Atk. 219
Batsford v. *Kebbell*, 3 Ves. 363
Booth v. *Booth*, 4 Ibid. 399.
Leake v. *Robinson*, 2 Mer. 363.
Pope v. *Whitcombe*, 3 Russ. 124 6 Law J. Rep. Chanc. 53.
Chevaux v. *Aislabie*, 13 Sim. 71
Beck v. *Burn*, 7 Bea. 492; s. Law J. Rep. (N.S.) 319.

Mr. Tinney replied.

WIGRAM, V.C. was of opinion t authorities were clearly in favour plaintiff's claim, and decreed accor The costs of the plaintiff, as betwee and party, and of the trustee as b solicitor and client, to be taxed an out of the shares to which the su nieces were entitled.

WIGRAM, V.C.
April 19;
June 11.
SHAILER v. GROVES.

Will, Construction of—Survivor—Substitution of Issue for Parents.

Testator gave two sums of stock to his widow for her life, and after her decease, one-half of the same stock was to be divided amongst his surviving brothers and sister, or their issue, share and share alike. The brothers and sister of the testator all died in the lifetime of the widow; and four of them only left issue living at the death of the widow:—Held, that the word "survivor" was to be construed with reference to the period of distribution, and that the issue (including remoter descendants) took in substitution the share their respective parents would have taken if they alone had survived the widow.

Thomas Shailer, the testator in the cause, by his will dated in 1798, bequeathed as follows:—"To my beloved wife, Matilda Shailer, I bequeath the whole of my property and effects of what nature soever of which I may be possessed at the time of my decease, save and except the following, namely, the principal sum of 1,000*l.* standing in my name in the 3*l.* per cent. consolidated Bank annuities, and the principal sum of 200*l.* in the 4*l.* per cent. Bank annuities likewise standing in my name; which said sums I desire may be disposed of in the following manner: viz. it is my will that my said wife shall receive and enjoy the whole of the interest arising on the said sums of 1,000*l.* 3*l.* per cent. consolidated Bank annuities and 200*l.* 4*l.* per cent. annuities during her natural life, and at her decease it is my will that one-half the produce of the said 1,000*l.* and 200*l.* stock shall be received and divided amongst my surviving brothers and sister, or their issue, share and share alike; and the remainder shall be divided amongst the relations of my wife, unless she shall think proper to order it otherwise by her will." The testator at his death left surviving him his widow, Matilda Shailer, and also seven brothers and one sister; who all died in the lifetime of the widow, four of them leaving issue, and the other three without issue. Upon the death of the widow, the eldest son and legal personal representative of one of the deceased brothers of the testator filed the bill against the trustee of the will, and the personal representative of the widow, who was also the surviving executrix of the testator, for distribution of the 1,000*l.* and 200*l.* stock given by the will to the brothers and sister of the testator or their issue after the death of the tenant for life.

Mr. Batten, for the plaintiff, contended that the word "survivor" referred to the death of the testator, and that the plaintiff, as representative of his father, was entitled to one-eighth of the fund in question. He cited—

Lord Bindon v. *Earl of Suffolk*, 1 P. Wms. 96.
Hawes v. *Hawes*, 1 Wils. 165; s. c. 3 Atk. 524.
Stringer v. *Phillips*, 1 Eq. Ca. Abr. 292, pl. 11.
Roebuck v. *Dean*, 2 Ves. jun. 265.
Stones v. *Heurtly*, 1 Ves. sen. 165.
Hallifax v. *Wilson*, 16 Ves. 171.
Wordsworth v. *Wood*, 2 Beav. 25; s.c. 9 Law J. Rep. (N.S.) Chanc. 29.
Doe d. *Long* v. *Prigg*, 8 B. & C. 231; s. c. 6 Law J. Rep. K.B. 296.
Cripps v. *Wolcott*, 4 Mad. 11.
Gibbs v. *Tait*, 8 Sim. 132; s. c. 5 Law J. Rep. (N.S.) Chanc. 344.
Taylor v. *Beverley*, 1 Coll. 108; s. c. 13 Law J. Rep. (N.S.) Chanc. 240.
Jenour v. *Jenour*, 10 Ves. 562.

Mr. J. V. Prior, for the other issue of the deceased brothers and sister, contended, that the word "survivor" must be construed with relation to the period of distribution, and that the issue would take *per stirpes;* and that not only children but remoter descendants would be entitled to share—

Newton v. *Ayscough*, 19 Ves. 537.
Pope v. *Whitcombe*, 3 Russ. 124; s. c. 6 Law J. Rep. Chanc. 53.
Williams v. *Tartt*, 2 Coll. 85.
Salisbury v. *Petty*, 3 Hare, 86.
Girdlestone v. *Doe*, 2 Sim. 225.
Dorville v. *Wolff*, *ante*, p. 179.

June 11.—WIGRAM, V.C.—In this case the word "survivor" must be referred to the period of distribution; and I think that the testator clearly intended to substitute for their parents the issue of such of the

brothers and sister as should die in the interval between his own death and that of the tenant for life. I am also of opinion, that the word "issue" will let in remoter descendants, and that such issue will take *per stirpes*. Declare that the brothers and sister of the testator, in the events that have happened, took no interest in the fund in question; but that the one moiety of that fund was divisible among the issue living at the death of the tenant for life, in the proportions in which their respective parents would have been entitled to the same if they alone had survived the tenant for life.

L.C. June 4. } ALEXANDER *v.* OSBORN.

Husband and Wife—Taking Bill Pro Confesso—76th Order of May 1845.

Where a husband and wife were defendants to a bill, but had neglected to put in any answer, and the husband had been taken under an attachment for want of answer, the bill was ordered to be taken pro confesso, *not only against the husband, but against the wife also.*

Two of the defendants to this suit were Bartholomew Hoggar and Martha his wife. An appearance had been entered for them by the plaintiff's solicitor, but neither of them had put in an answer, and on the 13th of January 1847, B. Hoggar was taken under an attachment. No order had been obtained that the wife might answer separately.

On the 27th of March 1847, the plaintiff moved before the Vice Chancellor Knight Bruce, that the bill might be taken *pro confesso* against B. Hoggar and his wife.

The Vice Chancellor directed it to be taken *pro confesso* against the husband only, and the application was now renewed before the Lord Chancellor by way of appeal.

Mr. Last appeared, in support of the application, and referred to the 76th Order of May 1845 (1), by which, upon the execution of an attachment against a d the Court may order the bill to *pro confesso* against *such defend* he contended, that under the old the bill would, in such a case as the be taken *pro confesso* against the well as the husband.

The LORD CHANCELLOR varied of the Vice Chancellor, by direc the bill should be taken *pro confes* the husband and wife, and stated Order of May 1845 was not int vary the old practice in this respec

(1) Beav. Ord. Can. 311; 14 Law J. Rep. (N.S.) Chanc. 291.

WIGRAM, V.C. July 7. } STAHLSCHMIDT

Defendant Bankrupt after Answ vice of Subpœna to hear Judgment.

Where a defendant becomes after answer, and his assignees a the Court, it is not necessary to bankrupt with a subpœna to he ment.

The defendant in the origin Arthur Lett, answered the original after answer became bankrupt. H nees were then brought before t by supplemental bill. A decree w without the bankrupt being serve subpœna to hear judgment. The declined to pass the decree witho for the bankrupt.

Mr. Freeling now applied to t to direct that the decree might be and contended that the assigne before the Court, the bankrupt w necessary party to the hearing; cited *Robertson* v. *Southgate* (1).

WIGRAM, V.C. was of opinion bankrupt was no longer a necessa and ordered accordingly.

(1) 5 Hare, 223; s. c. *ante*, p. 3

L.C.
May 22. } COPE v. RUSSELL.

Subpœna—Substituted Service.

Where a defendant was out of the jurisdiction, the Court declined to make an order for substituted service of the subpœna to appear and answer, upon a gentleman who had acted for him as attorney in an action wherein a judgment was obtained, upon which this suit was founded, and who had been since in communication with him upon the same matters, but who was not shewn to have any authority to act for him in the matter of the present suit, or with reference to the interests affected by it.

This bill was filed in accordance with the provisions of the statute 1 & 2 Vict. c. 110. s. 13. for the purpose of rendering a judgment a charge upon the real estates of the debtor, the defendant Russell.

In November 1845 the plaintiff brought an action against the defendant in the Court of Exchequer for the recovery of a debt, and obtained a judgment in the action.

In December 1845 the defendant filed a bill in this court against the plaintiff, to restrain him from issuing execution on his judgment, which bill was dismissed, with costs. Shortly afterwards, the defendant left this country, and had been since residing abroad.

In March 1847 this suit was instituted, and a motion was made on behalf of the plaintiff that service of the subpœna to appear and answer might be made upon the gentleman who had acted as the defendant's attorney in the action at law, and as his solicitor in his suit in Chancery.

In support of the motion an affidavit was filed by the plaintiff's solicitor, who stated that several negotiations had been carried on for the purpose of arranging some compromise of the demand of the plaintiff upon the defendant, which negotiations had been effected through the solicitor, who was in communication with the defendant.

Mr. R. L. Swift supported the motion, which was made in the first instance before the Vice Chancellor Knight Bruce, but his Honour declined to make the order, but recommended the parties to mention it to the Lord Chancellor.

The motion was now made before his Lordship; and *Hornby* v. *Holmes* (1) and *Murray* v. *Vibart* (2) were mentioned in support of the application; and it was submitted, on the authority of *Hornby* v. *Holmes*, that it was sufficient to shew that the solicitor acted in the "subject-matter" of this suit, and that the judgment at law was the subject out of which the present proceedings arose.

The Lord Chancellor. — *Hornby* v. *Holmes* was founded on the authority of *Hobhouse* v. *Courtney* (3), before the Vice Chancellor of England, in which there was a general warrant of attorney. There is also one case before Lord Lyndhurst; he confines the principle to cases where there is authority to act in the suit. The plaintiff having succeeded in an action, wants to take further proceedings in equity, and wishes to serve the defendant's attorney at law with the subpœna without shewing that he has any general authority to act for the client. What the Court requires is thus stated by Lord Lyndhurst in *Murray* v. *Vibart*, "The principle laid down by the Vice Chancellor of England, in *Hobhouse* v. *Courtney*, was the right one, viz. that where the defendant was abroad, and *had appointed an agent to act for him in the suit*, service on that agent would be good service on the principal." If *Hornby* v. *Holmes* is correctly reported, the Vice Chancellor Wigram has gone further than I should have done. Nothing can be more dangerous than because a man has employed an attorney in an action, and has gone abroad, to hold that you may serve a subpœna upon him in lieu of the principal. You must shew here that the party upon whom the subpœna is proposed to be served has some authority to act for the defendant.

(1) 4 Hare, 306.

(2) 1 Phil. 521; s. c. 14 Law J. Rep. (N.S.) Chanc. 217.

(3) 12 Sim. 140; s. c. 10 Law J. Rep. (N.S.) Chanc. 377.

L.C. June 4. { LORD PORTARLINGTON v. DAMER. LEWIS v. DAMER.

Two Suits for same Purpose—Costs of Proceeding in one Suit after Notice of Decree in another Suit.

Where two suits are instituted for the same purpose, and a plaintiff in one suit has notice of a decree in the other suit, but no order is obtained requiring him to stay further proceedings in his suit, if he proceeds, the Court will not allow him the costs of such further proceedings, but will not require him to pay the costs thereby occasioned to other parties.

The plaintiff in the first suit was beneficially interested in the residuary estate of Lord Portarlington, who died in 1845.

The second suit was instituted by one of his creditors. The object of both suits was the administration of his estate. A decree had been obtained in the first suit, and notice of it was given to the plaintiff in the second suit; but, notwithstanding that notice, he proceeded with his suit in the usual course.

On the 8th of May 1847 an order was made in these causes by the Vice Chancellor of England, upon the application of the plaintiff in the first suit, that all proceedings in the second suit should be stayed, and the plaintiff in the second suit was ordered to pay all parties the costs of the application; and it was thereby declared that the plaintiff in the second suit was entitled to his costs of that suit up to the time of service of the notice of the decree which had been obtained in the first suit.

The plaintiff in the second suit now moved by way of appeal that the order of the Vice Chancellor might be discharged or varied.

Mr. K. Parker and *Mr. Holt* appeared in support of the motion; and

Mr. Stuart, *Mr. J. Parker*, and *Mr. Follett* supported the order of the Vice Chancellor.

Mr. Collins appeared for a trustee.

The following authorities were referred to:—

Martin v. *Martin*, 1 Ves. sen. 211.
Brooks v. *Reynolds*, 1 Bro. C.C. 183.
Terrewest v. *Featherby*, 2 Mer. 48
Curre v. *Bowyer*, 3 Mad. 456.
Jackson v. *Leaf*, 1 Jac. & Walk. 2
Clarke v. *the Earl of Ormonde*, 108.
Pott v. *Gallini*, 1 Sim. & Stu. 206.
Anon. 2 Sim. & Stu. 424; and
2 *Daniell's Chanc. Prac.* 1488 (se edition).

The LORD CHANCELLOR said, that w a decree had been obtained in any under which the plaintiff in another might obtain all he sought in his own the Court would not allow him to have costs incurred by him after he had noti the decree. But if he chose to pro after such notice, he had the right to d until some of the other parties obtaine order of the Court against him, requi him to stay any further proceedings. Lordship did not, however, find that it the practice of the Court to make a p under such circumstances, pay the cost curred by other parties, and he must, t fore, vary that part of the Vice Chancel order which directed the plaintiff in second suit to pay any costs.

L.C. June 4, 9. } ALLEN v. KNIGHT.

Mortgage—Second Equitable Mort —Acquisition of Legal Estate after N —Title Deeds.

Certain stock, of which A, B, C, an were trustees, was sold out, and the pro lent to C. and D, upon the security o title deeds of property belonging to C. D, as tenants in common, the deposit accompanied by a memorandum of agre to execute a legal mortgage. C. havin tained the deeds from B, in whose cu they were deposited, made a second equi mortgage of his moiety to S, who, at the of taking his security, had no notice o prior charge. C. became bankrupt, an security being insufficient, S. (who had notice of the prior charge) took a co ance, under the bankruptcy, of C.'s m in satisfaction of his charge. On bi A. against B. and D. (C. being dead

cestuis que trust *of the stock and the second mortgagee, claiming to have his charge satisfied in priority to S:—Held, that the acquisition by S. of the legal estate would not alter the relative position of the incumbrancers, the conveyance being taken from the assignees of C, after notice of the express trust with which it was affected in his hands; and secondly, that the allowing the mortgagor to have possession of the title deeds was not of itself fraudulent so as to postpone the first mortgagee: and no fraudulent intent being charged, the Court declined to direct an inquiry, and made the usual foreclosure decree, but without costs.*

This cause was heard before Vice Chancellor Wigram, in May 1846. His Honour's judgment and the particulars of the case are reported 15 *Law J. Rep.* (N.S.) Chanc. 430.

The defendant appealed from that decision.

Mr. Rolt, Mr. Romilly, Mr. R. Palmer, Mr. T. Fisher, and *Mr. Hallett* appeared for the different parties.

Mocatta v. *Murgatroyd*, 1 P. Wms. 393.
Penner v. *Jemmett*, 1 Fon. Eq. 165.
Martines v. *Cooper*, 2 Russ. 198.
Head v. *Egerton*, 3 P. Wms. 280.
Priddy v. *Rose*, 3 Mer. 86.
Parry v. *Wright*, 1 Sim. & Stu. 369; s. c. 6 Law J. Rep. Chanc. 174.
Wiseman v. *Westland*, 1 You. & Jer. 117.
Lord Selsey v. *Lord Lake*, 1 Bea. 146; s. c. 8 Law J. Rep. (N.S.) Chanc. 233.
Farrow v. *Rees*, 4 Beav. 18.
Beckett v. *Cordley*, 1 Bro. C.C. 353.
Peacock v. *Burt*, 4 Law J. Rep. (N.S.) Chanc. 33.
Greswold v. *Marsham*, 2 Cases in Chanc. 170.
Stevens v. *Stevens*, 2 Coll. 20.
Brown v. *Stead*, 5 Sim. 535; s. c. 2 Law J. Rep. (N.S.) Chanc. 45.
March v. *Lee*, 1 Cases in Chanc. 162.
Higgon v. *Syddal*, Ibid. 149.
Ibbottson v. *Rhodes*, 2 Vern. 554.

The LORD CHANCELLOR (without hearing a reply) said that the dealing which had taken place with the legal estate would not affect the question of priority between the incumbrancers, under the circumstances in which the conveyance was made. He also thought that the possession of the title deeds by the mortgagor was not attended with any fraudulent intent or laches on the part of the first incumbrancer, so as to postpone his lien and give any priority to the second mortgagee. He thought the Vice Chancellor had come to a correct conclusion, and he must, therefore, dismiss the appeal with costs.

L.C. June 19. } CONNOR *v.* CONNOR.

Injunction—Suit in Ecclesiastical Court to recal Letters of Administration.

The fact that the ecclesiastical court has issued a citation for recalling letters of administration, is not sufficient to induce the Court of Chancery to interfere by injunction to restrain an administrator from transferring stock belonging to his intestate's estate, where no danger is shewn to be likely to arise therefrom to the estate.

This bill was filed by Margaret Connor, representing herself as the widow of Edward Connor, who died intestate on the 23rd of March 1847. The bill was filed for the administration of his estate.

On the 10th of April the defendant Anne Connor, who was the mother of the intestate, obtained letters of administration to her son's estate, on the ground that he died intestate and unmarried, the marriage alleged by the plaintiff being disputed by the family of the intestate. The plaintiff insisted that she had been lawfully married to him, and a citation had issued at the suit of the plaintiff against the mother, recalling the letters of administration.

On the 12th of June 1847, a motion was made on behalf of the plaintiff, before the Vice Chancellor of England, for an injunction to restrain the defendant Mrs. Connor from selling or transferring a sum of stock forming part of the intestate's estate, and from getting in his outstanding estate, and for the appointment of a receiver.

The Vice Chancellor made an order according to the terms of the notice of motion.

The defendant now moved that the order of the Vice Chancellor of England might be discharged.

Mr. James Parker and *Mr. Prior*, in support of the motion, contended that when letters of administration had been granted by the proper ecclesiastical court, the fact that a citation had issued for recalling those letters of administration, would not induce this Court to interfere with the authority which the party to whom those letters were granted was entitled to exercise until the grant was actually recalled; that in cases where the fund was in danger this Court would interfere, and would restrain a party from transferring or selling out an intestate's estate; but that interference was grounded upon the probability that the fund would otherwise be wasted, and would be granted as readily where the letters of administration were not likely to be recalled as where a citation was issued for the recalling of them. In *Watkins* v. *Brent*(1), there was no personal representative, but the fund was in danger of being wasted.

They also cited—

Knight v. *Duplessis*, 1 Ves. sen. 324.
Ball v. *Oliver*, 2 Ves. & B. 96.
Marr v. *Littlewood*, 2 Myl. & Cr. 454.
Jones v. *Frost*, 3 Mad. 1.
Dew v. *Clarke*, 1 Sim. & Stu. 108; s. c. 1 Law J. Rep. Chanc. 37.

Mr. Roupell and *Mr. Anderson*, contrà, contended, that by issuing a citation for the recalling of the letters of administration, the ecclesiastical court had at the least given reason for believing that the letters had been granted improvidently and erroneously. They were obtained as soon as possible after the death of Mr. Connor; and until it could be ascertained whether a valid marriage did or did not take place between him and the plaintiff, the fund ought to be secured.

Mr. James Parker, in reply to a question from the Lord Chancellor, stated that his client was willing that the stock should be transferred into the name of the Accountant General in this suit.

The Lord Chancellor said, that when the letters of administration were granted there was no opposition to the grant on the part of the plaintiff, and she did not now allege any danger of insolvency in respect of the defendant, nor any mal-administration of the estate. A case was raised by the bill, which might be substantiated or might fail. As the defendant consented to bring the fund into court, it was an ordinary case, in which the legal title was disputed. He thought the Court ought not to interfere with the powers which were at present vested in the defendant; and he should discharge the order, but without costs (2).

(1) 1 Myl. & Cr. 97; s. c. 5 Law J. Rep. (N.S.) Chanc. 49.

Wigram, V.C. June 11; July 2. } FORD v. WASTELL.

Foreclosure — Enlarging Time — Inrolment of Decree absolute.

Where an order of foreclosure absolute has been inrolled, a motion to enlarge the time for payment of the money must be made before the Lord Chancellor; and the form of the application should be, to discharge the order and vacate the inrolment, conditionally upon payment of the money within the enlarged time. A decree of foreclosure made is no impediment to granting an enlargement of the time, if a sufficient case is made out upon the merits.

The plaintiff, the solicitor of the defendant in an administration suit, upon being discharged brought his action against the defendant for costs, and obtained judgment; and in respect of that judgment, which was registered under 1 & 2 *Vict. c.* 110, *filed his bill against the defendant to foreclose her interest in the property, the subject of the*

(2) The same principle was acted upon by the Master of the Rolls, on the 30th of July 1847, in a case of Newton v. Ricketts. In that case the will of Sir R. Ricketts had been admitted to probate in the ecclesiastical court. A suit was afterwards instituted for recalling the probate, and the executors had been ordered to bring the probate into court, and prove the will in solemn form. A motion was made before the Master of the Rolls to restrain the parties who were acting under the probate from interfering any further in the management of the testator's estate, but the Master of the Rolls refused the motion. It was renewed before the Lord Chancellor on the 5th of August, but his Lordship concurred in the opinion of the Master of the Rolls, and also refused the application.

administration suit, and obtained an order of foreclosure absolute. Upon the application of the defendant to enlarge the time for payment, the cause shewn was that the debt in respect of which the judgment was recovered was the costs incurred in the administration suit; that that suit was upon the point of being wound up; and that the interest of the defendant in the result of that suit was four times the amount of the plaintiff's debt; and that the plaintiff had no means of payment other than her rights under that suit:—Held, sufficient ground on the merits for enlarging the time.

This was a motion to enlarge the time for payment of mortgage money after an order of foreclosure made absolute and inrolled.

Mr. Wood and *Mr. Goodeve*, in support of the motion, cited—

Coker v. *Beavit*, 1 Rep. in Ch. 253.
Jones v. *Creswicke*, 9 Sim. 304; s. c. 9 Law J. Rep. (N.S.) Chanc. 113.
Ismoord v. *Claypool*, 9 Sim. 317.
Burgh v. *Langton*, 15 Vin. 476.
Nanny v. *Edwards*, 4 Russ. 124; s. c. 6 Law J. Rep. Chanc. 20.
Edwards v. *Cunliffe*, 1 Mad. 287.
Eyre v. *Hanson*, 2 Beav. 478; s. c. 9 Law J. Rep. (N.S.) Chanc. 302.
Anon. Barnard. 221.

Mr. Romilly and *Mr. Randell*, contrà, contended that the Court had no jurisdiction after the order for foreclosure had been inrolled.

The facts and arguments are fully stated in the judgment.

July 2.—WIGRAM, V.C.—Upon the death of William Wastell, Ellen Miles Wastell, as one of his children, became entitled to one-third of a sum of 4,000*l.*, charged, by the marriage settlement of her parents, upon the estates of her grandfather, Sir John Miles, and also to one-third of the residuary real and personal estate of her said grandfather under his will. On the 12th of January 1838, after the death of William Wastell, Ellen Miles Wastell and Harriet Ann Wastell, another of the children of William Wastell, having a similar interest in the estate of her grandfather, instituted the suit of *Wastell* v. *Leslie*, to have the accounts taken of the real and personal estate of Sir John Miles, and the trusts of his will executed under the decree of the Court. By the decree in that cause certain accounts and inquiries were directed; and it was ordered, among other things, that an annuity of 200*l.* a-year should be paid to E. M. Wastell, and that that sum should go in part of the sum of 4,000*l.*, to one-third of which she was entitled under the marriage settlement of her father and mother. The report was made in this cause, and exceptions were taken to that report, and the case is set down upon the exceptions and for further directions.

At the time of the institution of that suit, Messrs. Hicks & Marris acted as solicitors for the Misses Wastell, and continued so to do till June 1840, when they were discharged; and thereupon the plaintiff in the present suit, Mr. Ford, became the plaintiff's solicitor in that cause, and continued to conduct the cause until 1843, when he also was discharged, and the management of the suit was intrusted to other solicitors. Ford, upon being discharged, brought his action against E. M. Wastell (her sister Harriet Ann having married and gone abroad) for his costs in the suit, and I will assume for other costs also. In June 1844 he obtained judgment in the action for 431*l.* 19*s.* 10*d.* On the 18th of June 1844 that judgment was entered up; and on the 25th of June 1845 the present suit was instituted by Ford; the object of which was to have, under the 1 & 2 Vict. c. 110, the benefit of a decree of foreclosure of all her interest in the property, the subject of the suit of *Wastell* v. *Leslie*. In July 1846, the common decree of foreclosure was made; and in December 1846, the Master, by his report, found that the sum of 574*l.* 12*s.* was due to the plaintiff in respect of his judgment debt and interest thereon, and he appointed the 18th of March 1847 for payment of that sum. On the 18th of November 1846 that report was confirmed, and on the 18th of March 1847 the plaintiff attended to receive the money. The money was not paid; and on the 23rd of March 1847 an order was made that E. M. Wastell should stand absolutely debarred and foreclosed of and from all right, title, and interest in the undivided third part or share of the said property, the subject of the suit of

Wastell v. *Leslie*. The order of the 23rd of March 1847 was afterwards inrolled; and the present application, of which notice was given on the 4th of June last, is, that this Court would be moved, by counsel, for the defendant, on the 12th of June 1847, or so soon after as counsel could be heard, that the time appointed by the Master's report for payment of the sum found due for principal, interest, and costs to the plaintiff, might be enlarged for a period of six calendar months, or to such other period as the Court might direct; and that, notwithstanding the order of the 23rd of March last. The notice of motion in this case does not seek to discharge the order of March last, but that the time may be enlarged notwithstanding that order. I should not have allowed that to stand in the way of my giving relief, but, upon looking at the precedents, it appears that the common form of application is, that the order may be discharged upon payment of the money at the expiration of the enlarged time, and that upon failure of payment the order should stand.

The case upon the merits is this:—That the defendant has no property whatever, except that which was the subject of the suit of *Wastell* v. *Leslie*; that she was totally destitute of the means of living, by reason of the non-termination of the suit, and that she was then dependent on the bounty of a friend for the necessaries of life; that she had every personal motive to accelerate the termination of the suit, but that she had hitherto been unable to do so; that the plaintiff's debt consisted of costs incurred in the prosecution of the cause of *Wastell* v. *Leslie;* and that those costs would be paid out of the fund in the cause; and that the amount of her share in the testator's estate was five or six times as great as the amount of the debt; that she fully expected that the suit of *Wastell* v. *Leslie* would have been terminated before the time appointed by the Master for payment of the money; but that the suit had in some degree been delayed by the plaintiff insisting that he ought to be made a party thereto in respect of the charge sought to be effected by him in the present suit.

On behalf of the plaintiff Ford, it was represented that the debt in respect of which he recovered the judgment, consisted of costs in the cause of *Wastell* v. *Leslie*, of costs in the action, and
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the order for making the foreclosure absolute, by directing the order to be discharged upon the condition that the money be paid at the expiration of the enlarged time, and if no payment that the order should stand.

The next point insisted on by the plaintiff was, that the inrolment of the order of the 23rd of March, making the foreclosure absolute, was a bar to the application being granted. One reason why I have gone into the case so fully is, that it appeared to me, at the time of the argument, that the objection could not be sustained to the extent contended for. If indeed it were necessary that I should re-hear the order of the 23rd of March, the objection must prevail. I cannot re-hear an order that is inrolled. The Lord Chancellor, however, would be equally without jurisdiction in that respect, and the House of Lords could only re-hear it for the purpose of deciding whether the order was proper at the time it was made,—a matter not in dispute. It could not intervene upon an original application to enlarge the time.

But the object of the present application is not to dispute the propriety of that order at the time it was made; but the ground of the application, admitting the order of the 23rd of March last to have been originally right, was that upon matter subsequent to the order the Court ought to enlarge the time for payment of the money. In *Coker* v. *Beavit*, cited at the bar, that was the ground of objection to the order, and on the matter subsequent to the order the Court granted the application. If I am right in saying that for the purpose of granting such indulgence in a proper case, the order of the 23rd of March, if not inrolled, might have been discharged, the only question on that part of the case is, whether I might not, for the same purpose, order the inrolment to be vacated. My opinion is, that the case on the merits being proper for enlarging the time, the inrolment is no impediment to an order being made for that purpose by a Court of competent jurisdiction. Two of the cases cited in the note to *Jones* v. *Creswicke* are authorities for this; so are also the cases of *Coker* v. *Beavit* and *Ismoord* v. *Claypool*.

The remaining question is, whether I have, as Vice Chancellor, power to order the inrolment to be vacated. That is the only question. I thought, at one time, I might have got over the difficulty by making the order on the matter subsequent to and notwithstanding the order of the 23rd of March, as on a bill of review. I might supersede the original decree, though signed and inrolled. But on the best consideration I could give the case, I think the proper order to be made, if any is made, must be an order vacating the inrolments, discharging the order of the 23rd of March, on condition that the money is paid on the day appointed, and then if not paid, that the order, with the inrolment, should stand. But as I find that all applications to vacate an inrolment have been made before the Lord Chancellor, I must, though very reluctantly, on that ground, refuse to make the order in the present case. I find that even in cases where the Court has made the order to vacate the inrolment on the ground of surprise, or *mala fides*, the order has invariably been made by the Lord Chancellor.

L.C. June 2. } LAW *v.* LAW.

Pleading—Parties—Accounts of Estate of a Deceased Partner.

Three persons carried on business in partnership. Two of them died, and the executors of one of them (R) entered into an agreement to purchase the shares of the other two. A bill was afterwards filed by some of the residuary legatees of R. for an account of his personal estate, against the other residuary legatees and his executors, and also against the surviving partner and the executors of the other deceased partner: —Held, that under the special circumstances of the case both the last-named parties were properly made parties to the cause.

Robert Law and Thomas Law, both since deceased, and Samuel Law had for many years carried on business as co-partners without any deed or articles of partnership. In January 1842 Robert Law died, and by his will he gave seven-eighths of his share in the partnership property to his wife, two sons and four daughters, in equal shares as tenants in common; and he gave the remaining one-eighth part to four persons,

whom he afterwards appointed his executors, in trust, for his daughter Susan, the wife of John Dawson, and her children. In November 1842 Thomas Law died, and in the same month one of the four executors of Robert Law also died. The business was carried on by the executors in conjunction with the surviving partners or partner till March 1843, when the executors of Robert Law entered into an agreement for the purchase from Samuel Law and the executors of Thomas Law of the shares of Samuel and Thomas for 6,200*l.*; and in April 1845 a decree was made by Vice Chancellor Knight Bruce for the specific performance of the agreement by the executors of Robert Law. This suit was instituted by the widow of Robert Law, and two of her daughters and their husbands, against the other parties beneficially interested under his will, the three surviving executors of Robert Law, the personal representative of the deceased executor of Robert Law, and the executors of Thomas and Samuel Law. It stated certain inaccuracies in the accounts, which had been taken respecting the partnership, and prayed that an account might be taken of the personal estate of Robert Law and his share in the partnership ascertained, and that special directions might be given respecting certain items of account as to which the bill alleged that there were unfair entries in the partnership accounts. Samuel Law and the executors of Thomas Law put in a joint answer, and submitted that they were not necessary parties to a suit for the administration of the estate of Robert Law.

The cause was heard before Vice Chancellor Knight Bruce immediately after the suit before referred to for specific performance of the agreement of 1843. His Honour was of opinion that there were special circumstances in this case which rendered it proper that those persons should be parties to this suit, and he overruled the objection.

Those defendants now raised the question before the Lord Chancellor, on appeal from His Honour's decision.

Mr. Cooper and *Mr. W. T. S. Daniel*, for the appellants, contended that as no collusion was alleged to exist, the circumstances of this case contained nothing which rendered it necessary or proper to have Samuel Law or the representatives o mas Law mixed up with accounts related only to the estate of Robert and that the observations of Lord wicke in *Newland* v. *Champion* (1) not supported by the facts of the They also referred to—

Beckley v. *Dorrington*, 2 Eq. Ca 253; s. c. 6 Ves. 749, cited.
Bowsher v. *Watkins*, 1 Russ. & 277.
Gedge v. *Traill*, Ibid. 281, n.; 2 Law J. Rep. Chanc. 1.
Holland v. *Prior*, 1 Myl. & K. 2

Mr. Russell and *Mr. Elmsley* ap for the plaintiffs, but—

The Lord Chancellor (without h them) expressed an opinion, that af executors of Robert Law had agr purchase the shares of Thomas and S in the partnership, and that agreeme received the sanction of the Court were in such a position that they co effectually conduct any litigation wit parties respecting the matters whic questioned by this bill. These defe were persons who were liable to acco the estate of Robert Law; but the p who represented that estate were pre by their course of dealing with those ac ing parties from taking the steps were necessary for obtaining any against them; and under those ci stances the parties who were bene interested in the estate were entitled in their own names, and to make parties defendants. The appeal must fore be dismissed with costs.

L.C. June 2, 4. } LENAGHAN *v.* SMITH.

Pleading—Parties—Breach of Tr

A trust fund, to which two partie entitled in equal shares, had been impr sold out. One of the parties was the leg sonal representative of the testatrix, whose will the trust was created, and bill against the defaulting parties and th

( ) 1 Ves. sen. 105.

cestui que trust:—*Held, upon demurrer, that the other* cestui que trust *was properly made a party.*

The principle laid down in Perry *v.* Knott (1) *approved, but the application of it to the circumstances of that case impugned.*

Under the will of Mrs. Ann Cossen, who died in 1797, her sole executor, Simon Staughton the elder, stood possessed of the residue of her personal estate, which consisted of 2,700*l.* 3*l.* per cent. consols, in trust, for Mary M. Smith, the wife of the first-named defendant, John Smith, for her life, for her separate use; and after her decease in trust for her children who should be living at her death, in equal shares. Mary M. Smith died in January 1846, and her two only children then living were Susanna F., the wife of Patrick Lenaghan, who were the plaintiffs in this suit, and Mary Smith.

The trust fund had been dealt with as follows:—Simon Staughton the elder died in 1813, and his will was proved by Samuel Staughton and Stephen Staughton, who thereby became his personal representatives, and also the personal representatives of Ann Cossen. Under a power of attorney given by these gentlemen to Simon Staughton the younger, and John Smith, the 2,700*l.* was sold out and invested in other stock in the name of Simon Staughton the younger and John Smith. Stephen Staughton survived Samuel, and died some time ago intestate, and had no legal personal representative. Simon Staughton died in 1838, and Lucy May was his executrix, and she concurred with John Smith in selling out the trust fund. John Smith appropriated the proceeds to his own use. The plaintiff, Susanna F. Lenaghan, was now the personal representative of Ann Cossen, by virtue of letters of administration *de bonis non*, which she procured to be granted her in August 1846.

The defendants to the suit were John Smith and Lucy May: and the bill prayed a declaration that the plaintiffs were entitled to have a sum of 2,700*l.* 3*l.* per cent. consols purchased in their names by the defendant, John Smith, and that he might be decreed to purchase the same; and that Lucy May was also liable to make good any loss which might arise to the trust fund, in consequence of the sale and transfer which had been made with her concurrence. The bill was afterwards amended, by making Mary Smith a party defendant, and she thereupon put in a demurrer.

It was first heard before the Vice Chancellor of England, who overruled the demurrer. Mary Smith appealed from that decision.

Mr. Cooper and *Mr. Marshall*, in support of the demurrer, contended that as Mrs. Lenaghan was the personal representative of the testatrix, Mrs. Cossen, the plaintiffs were competent to sue for the recovery of any part of her estate without making Mary Smith a party to the suit, as being beneficially interested; that the trust fund was to be divided in equal moieties between Mrs. Lenaghan and Mary Smith, and therefore that if either of those parties thought proper to sue for her own moiety, it was not necessary to bring the other party before the Court. They cited—

Smith v. *Snow*, 3 Mad. 10.
Hutchinson v. *Townsend*, 2 Keen, 675; s. c. 6 Law J. Rep. (N.S.) Chanc. 13.
Perry v. *Knott*, 5 Beav. 293.

Mr. Stuart and *Mr. Bilton* appeared for the plaintiffs, but were not called upon.

The LORD CHANCELLOR was of the same opinion with the Vice Chancellor, that this demurrer must be overruled. With regard to the principle laid down in *Perry* v. *Knott*, the Master of the Rolls observed, "As to the next point, I conceive this to be a distinct demand for a distinct aliquot part of a distinct sum; and upon the authority of *Smith* v. *Snow*, I think that the representative of William Howell is not a necessary party to the suit." This principle was perfectly correct, and he (the Lord Chancellor) should entirely concur in it. But the circumstances in *Perry* v. *Knott* appeared to him to be such, that he should have felt great difficulty in applying the principle to that particular case. A trust fund might be improperly sold out, and an adult and an infant be jointly interested in it. If the adult might file a bill for his share only, he might perhaps recover his own part and leave nothing for the infant.

(1) 5 Beav. 293.

He should have hesitated in coming to the conclusion to which the Master of the Rolls had arrived in that case.

WIGRAM, V.C. April 26, 27, 28, 29; June 21. } SOUTHCOMB *v.* THE BISHOP OF EXETER.

Specific Performance—Rescinding Contract—Laches of Vendor.

In October 1840, *the Bishop of Exeter, the defendant, entered into a written contract with the plaintiffs, to purchase from them their interest in certain lands belonging to the see held by the plaintiffs under a lease for three lives, dated in* 1823, *and granted by a former bishop. The lease of* 1823 *was admitted to be invalid, by reason of the non-surrender of a prior lease of* 1790; *and it was one of the terms of the contract that the defendant should raise no objection to the title on that ground, if the purchase should be completed in his lifetime, but that a good title should be deduced in all other respects; but if the purchase should not be completed in the defendant's lifetime, his representatives should be entitled to question the validity of the lease of* 1823. *A deposit was paid on the signing of the contract, and on the* 30*th of October following an abstract was delivered; objections were taken, and in December following a further abstract was sent. In February* 1841, *objections were taken to the title shewn on the further abstract; and in July* 1841 *an additional further abstract was sent. Objections being taken and not answered, on the* 20*th of August* 1841 *the defendant gave a formal notice of rescinding the contract. Various communications on the subject of the title afterwards took place between the parties, but always expressed to be without prejudice to the notice of rescinding. In November* 1841, *the defendant required further evidence, and intimated that if it were not perfected within two months, he would fall back upon his original position under the rescinded contract. On the* 17*th of January* 1842, *immediately upon the expiration of the two months, the defendant gave notice that he insisted upon the notice of rescinding of the* 20*th of August* 1841, *and he declined any further communication. Nothing more passed between the parties until the* 30*th of August* 1843, *when the vendors filed their bill for specific performance:—Held, that the unexplained delay of the vendors from the* 17*th of January* 1842 *to the* 30*th of August* 1843 *had precluded them from the assistance of a court of equity in enforcing performance of the contract, and especially in a case where time was so material; and the Court refused to direct a reference as to whether a good title had been shewn on the* 17*th of January* 1842, *and dismissed the bill with costs.*

Where, after notice of rescinding the contract, a correspondence on the title is continued under protest, this gives to the correspondence the character of a treaty for the renewal of the rescinded contract, and not of the continuation of a subsisting contract.

The circumstance, that the purchaser, after notice of rescinding, has allowed the deposit to remain in the hands of the vendor without taking any steps to enforce repayment, is no excuse for the vendor's laches in not enforcing the contract.

Quære—*Whether the Court could, by decree in the cause, order repayment by the plaintiff of the deposit.*

This was a bill by the vendors for the specific performance of a contract for the purchase of certain leasehold interests held under the see of Exeter. The defence was, that the vendors had failed to make out their title according to the contract; and that if a good title could be shewn, the vendors were precluded from relief in equity by their laches.

Mr. James Parker and *Mr. Rogers*, for the plaintiffs.

Mr. Romilly, *Mr. Rolt* and *Mr. J. V. Prior*, for the defendant.

The case was decided upon the point of laches only; the facts and the arguments relating to which are fully noticed in His Honour's judgment.

June 21.—WIGRAM, V.C.—The Bishop of Exeter for the time being is entitled in right of his see to the Manor of Bishop Nympton, otherwise Bishop's Nymet, in the county of Devon, with the rights and appurtenances thereto belonging; and also to the messuages, edifices, lands, tenements,

hereditaments and profits, with the appurtenances, to the said manor belonging or appertaining. Before and at the time of making the agreement of the 16th of October 1840 (hereafter mentioned), the plaintiffs in the cause claimed to be entitled to the said manor, lands and premises for the residue of a lease for the three lives of Ann Lewis Northcote, William Hole and the plaintiff, Lewis Southcomb, which lease had been granted by Carey, then Bishop of Exeter, by an indenture of the 10th of March 1823. A question, however, existed as to the validity of this lease, which was expressed to be in consideration of the surrender of a prior lease for three lives granted by indentures of the 21st of October 1790; and it was contended, on the part of the advisers of the present Bishop of Exeter, that the lease of October 1790 was not duly surrendered on the occasion of granting the renewed lease of March 1823, and that the lease of March 1823 was therefore void. Assuming, for the purposes of the argument, that this objection to the lease of March 1823 was good, the plaintiffs' interest in the lease was obviously unmarketable, as between the plaintiffs and a stranger, even though the plaintiffs should have a good title to the manor, lands and premises for the residue of the prior lease. But as between the plaintiffs and the bishop the case was otherwise. For if the plaintiffs were in a condition to make a title to the lease of March 1823, assuming its validity, and the bishop purchased it from them, he, as the person interested in taking advantage of the objection, might (though a stranger could not) make his interest secure. In 1838 Ann Lewis Northcote died, and it was then considered to be for the benefit of the bishop that the lease of March 1823 should be either treated as void or purchased by himself; and it is due to the Bishop of Exeter that I should state, that he does not appear for a moment to have entertained a thought of prosecuting his own interests at the expense of the plaintiffs. The correspondence preceding the agreement, the specific performance of which is the object of this suit, shews this. It is shewn also by the terms of the agreement itself; and the statement, which the bishop's counsel were instructed to make at the hearing of the cause (written instructions as I understand) shews that the same honourable feeling and intentions on the part of the bishop have continued without interruption and still continue. I think it right to make this statement, because observations might arise with respect to that point. The bishop throughout has offered, and still offers, to pay the value of the lease according to the terms of the agreement, treating it for this purpose as valid, provided the plaintiffs can shew that they are in a condition to make a good title to the lease, supposing it to be good.

By an agreement, being the agreement in question, bearing date the 16th of October 1840, and made between Lewis Southcomb, of the first part, J. G. Pearse, Philip Pearse, John Burgess, William Hole, and Henry Baker of the second part, Susannah Southcomb and the remaining plaintiffs, being nine of her ten children, of the third part, and the Bishop of Exeter of the fourth part, the parties of the first, second and third parts agreed to sell, and the Bishop of Exeter agreed to purchase, all those five-eighths and nine-tenths of the three-eighths, and also the estate, during widowhood, of Susannah, in the remaining one-tenth in the manor, lands and tenements aforesaid, for and during the natural lives of William Hole and the plaintiff Lewis Southcomb, and the life of the longest liver of them, under or by virtue of the lease of the 10th of March 1823; but the contract was not to extend to the copyhold estates and interest of Susannah in certain copyholds of the manor. The agreement contains special terms upon which the contract was to be completed, and the following may usefully be referred to on the present occasion:—The purchase-money was to be 8,000*l.* The purchaser was to pay his deposit at the rate of 20*l.* per cent. immediately; and the balance on the 29th of September then next: at which time the contract was to be completed. The purchaser was to have possession from the 29th of September; and if, from any cause, the completion of the purchase was delayed, the purchaser was to pay interest at 5*l.* per cent. The agreement is divided into clauses, and contains in it a clause which is marked as the seventh clause, and which is in these words:—"The sellers shall, at their own

expense, forthwith prepare and deliver to the purchaser, or his solicitor, an abstract of their title to the said premises hereby agreed to be sold, and deduce a good title thereto, subject as herein mentioned, that is to say, that if the purchase shall be completed in the lifetime of the said Henry Lord Bishop of Exeter, the purchaser shall not be entitled to make any objection to the validity of the lease of the 10th of March 1823, on the ground of any defect or omission in the surrender, prior to the granting of such lease, of any former lease or leases; but, nevertheless, the sellers shall either shew the determination of all previous leases, or shall deduce a good title to and produce a surrender or conveyance to the purchaser of all interests which are still subsisting under or by virtue thereof in the five-eighth parts of the remaining three-eighth parts hereby agreed to be sold, of the said manor and premises; except only the estates and interests of any copyholders or under-lessees, to whose copyhold grants or under-leases the present sale is made subject. But if the purchase shall not be completed in the lifetime of the said Henry Lord Bishop of Exeter, then his representatives shall be entitled to have the validity of the said indenture of lease of the 10th of March 1823 satisfactorily made out, in the same manner as if no such stipulation had been introduced; with power, nevertheless, for the vendors, if they shall think fit, in such case to declare the contract rescinded, in which case the deposit-money shall be returned, without interest or expenses. The abstract shall be returned to the sellers' solicitors within twenty-one days after delivery, with the opinion of the purchaser's counsel or solicitor thereon; and the purchaser or his solicitor may, at the purchaser's expense, compare the abstract with the title-deeds at the place or respective places where the same may be."

Upon the execution of the above agreement the bishop paid 1,600*l.* by way of deposit; being 20*l.* per cent., as agreed. On the 30th of October 1840 the abstract was delivered to Mr. Barnes, the bishop's solicitor. Objections and disputes upon the title arose; and finally, the bishop having refused to perform the contract, the original bill was filed on the 30th of August 1843; and the suit, having abated by the d George Southcomb, has since been co ed by revivor. The cause being at and witnesses having been examined cause, it was argued before me on th 27th, 28th, and 29th of April in the year, and I am now to give my upon the case so argued.

For the purpose of making the g of my opinion more clear, I shall be excluding from my consideration circumstances which relate to the the bishop and his agents respecting called Crosse Farm, done since the agr of the 16th of October 1840; and afte consider the bearing of those acts up other parts of the case. The abstr delivered on the 30th of October The persons who acted as solicitors parties respectively were, for the pl Mr. Rickards; the bishop, Mr. Bar Mr. Karslake, until Mr. Barnes w the continent in September 1841 since that time the bishop's solicito been Mr. Saunders, the defendant, place of Mr. Barnes; Mr. Karslal tinuing to act as before. On the December 1840, Mr. Rickards wr Mr. Barnes, and says, "I send yo with a further abstract of the title property; also answers to the questi observations; and hope this will be satisfactory." Then, on the 4th of ber 1840, Mr. Barnes writes to Mr. Ri acknowledging the receipt of the mental abstract, and expresses his hension that the bishop's couns require yet more; and in this le points to the distinction, to which already adverted, between the vali the lease of March 1823, and the v title to that lease, assuming it to b On the 15th of December 1840, Mr. writes to Mr. Rickards, and sends ther opinion of counsel. On the November 1840, Mr. Barnes writes Rickards, acknowledging the receipt abstract, and asking for an earlier ti that shewn by the abstract. On t of November 1840, Mr. Barnes w Mr. Rickards, and repeats his reques earlier title, and also for a further a On the 14th of November 184 Rickards writes to Mr. Barnes, evidence of title may be requisit

promises a further abstract. On the 18th of November 1840, Mr. Barnes repeats his request to Mr. Rickards for a further abstract, and forwards him further observations, "arising from the opinion of our counsel received to-day." On the 30th of December 1840, Mr. Rickards writes to Mr. Barnes, and sends further answers to the observations of Mr. Barnes, and promises further information.

The correspondence between the solicitors continued in this way down to the 27th of February 1841, without anything being specifically mentioned therein relating to the title which appears to me to call for observation; but on that day Mr. Barnes, in a letter to Mr. Rickards, notices a point in the title, out of which more immediately the present suit may be considered to have arisen. I should have stated that the conveyance, before the 27th of February, had either been prepared, or was in a course of preparation, but expressly without prejudice to the question of title. By the vendors' abstract (and this is the point I have stated as being the point out of which the suit has arisen), it appeared that the plaintiff Lewis Southcomb's title to a material share of the property in the contract was acquired by a purchase, and was intended to have been conveyed by indentures of the 28th and 29th of September 1836, from H. Northcote and Ann Lewis his wife, in consideration of 4,500*l.*; and according to this conveyance, the same was or purported to be effected by the exercise by Ann Lewis Northcote of a power of appointment, of which she was donee under the will of Anne Southcomb. This power, I may state as a fact, was not well executed, and the point is noticed in Mr. Barnes's letter of the 27th of February 1841. This point was the subject of correspondence between the solicitors from the 27th of February 1841, down to the 28th of April 1841; both solicitors apparently supposing that the invalidity of the execution of the power might be remedied in a very simple manner; but that error was dispelled by the opinion of counsel, and this was communicated by Mr. Barnes to Mr. Rickards on the 7th of May 1841. After other letters, which are not necessary to be noticed, Mr. Barnes writes to Mr. Rickards, on the 29th of May 1841, this letter: "I have not received any answer to my letter of the 7th instant, apprising you of the advice of counsel, that the defect in the appointment was not cured by the second attestation."—I ought to observe, the way they thought the difficulty could be removed was by a second attestation; that is what is referred to.—"Under these circumstances it is my duty, on the part of the purchaser, to state explicitly, that objection is taken to the title on that ground, and that it remains for you to remedy it, which, I learn, you expressed hopes of being able to do on grounds independent of the second attestation. In the mean time the parties will stand under the conditions of the contract; the consequences of delay in making good the title remaining with the vendors. Any act which may have been done on the part of the purchaser with reference to the estate, having been done with the concurrence of the vendors in ignorance of the objection, the purchaser is now ready to make any arrangement respecting the possession and management which may be fit until it be ascertained whether you can or cannot perfect the title." That latter part relates to the point about Crosse Farm. Then, on the 24th of June 1841, Mr. Barnes writes to Mr. Rickards, "I have been expecting your reply to my letter of the 29th of May, which I hope you will favour me with." On the 30th of June 1841, Mr. Barnes writes to Mr. Rickards, "Without pretending to offer advice I will make a suggestion; do you think it desirable that we should meet? if you do, I am disengaged all next week." Then on the 12th of July 1841, Mr. Karslake writes to Mr. Rickards, and says, "On my return from the south of Devon last week, I called on Mr. Barnes, and found that you and he had not met on the Bishop's Nympton purchase since you were in London. Mr. Barnes is obliged to go with his family to Italy in a few weeks, I believe owing to the delicate health of his children; and I very much wish you would meet in the mean time, so that all matters may be left in a state of understanding between you, and particularly as Mr. Barnes talked of requesting me to attend to the matter during his absence." On the 21st of July 1841, Mr. Rickards writes to Mr. Barnes, and says, "I am sorry I have not been in a situation to communicate with you before. The reasons I need not ex-

plain; but suffice it to say, that they have been imperative. With this I send you an additional abstract of the title, by which it will appear that the features in the title to the late Mrs. Northcote's moiety are materially altered; for that lady, instead of deriving her title under the will of her mother, Mrs. Anne Southcomb, of the 30th of June 1805, became entitled under the abstracted deeds of 1781, subject to her mother's life estate under the same deeds. We knew nothing of the deeds until lately. Probably Mrs. Northcote might have been induced to recognize her mother's assumed power and disposition of the property, as a matter of convenience to herself, since she thereby secured to herself a separate estate, which would not have been the result of the deeds; and as no settlement was executed on her marriage with Mr. Northcote, her apparent acquiescence may be accounted for on this ground; or she might not possibly have been aware of the existence of deeds in 1781, and might have acted in ignorance of her right. However this may be, it is clear that her title accrued under the conveyance from her father, and consequently she had full power to make a valid disposition and conveyance by the deeds of the 28th and 29th of September 1836, and the acknowledgment of these deeds under the statute, without the aid of the power given by her mother's will, which was, in fact, totally inoperative, inasmuch as the party making it was in no way competent to deal with the property beyond the period when her life estate determined. I hope sincerely that the facts here presented will remove all further difficulty, and that we may speedily be able to settle the purchase. I shall be in Exeter next week at the assizes, and will then see you." Subsequent letters having passed between them on other points, the point as to the title depending upon the validity of the execution of the power is again revived. Then, on the 20th of August 1841, Mr. Barnes writes to Mr. Rickards this letter:—"Bishop's Nympton. Dear Sir, I came here to consult counsel on the state of title, and have attended a consultation of Mr. Duval and Mr. Prior. At my request Mr. Karslake was present. The whole of the papers were before them, and I have their joint opinion, that, for the reasons already stated, the title is defective. The bishop is, in consequence, advised to rescind the contract, and demand the repayment of the deposit, with interest and costs." This, it is to be recollected, was written after the question of the validity of the execution of the power had been considered; and after Mr. Rickards had given such further abstract as he thought would have removed the objection, by shewing that the title could be made good on other grounds —"and I have to request that you will consider this as an intimation to that effect." That was a notice for rescinding the contract, on which the argument at the bar, to a great extent, turned.

Now, the bill in this case, it will be remembered, was not filed until the 30th of August 1843; and one question I have had to consider has been, whether the vendors are entitled to the common reference as to title; for the vendors have not contended for more than this; or whether, in the circumstances of the case, the delay which has taken place in filing the bill is or is not at once an answer to the plaintiffs' case, although a good title should have been shewn before the 20th of August 1841, or can now be shewn. In considering this, I can state two propositions, about which individually I entertain but little doubt with reference to the authorities. First, if the plaintiffs had, immediately on the receipt of the bishop's letter of the 20th of August 1841, or had within a reasonable time afterwards filed their bill, I should have had no doubt of the vendors' right to the common reference as to title. Secondly, if the defendant had simply acquiesced in the notice of the 20th of August 1841, and had delayed filing his bill till the 30th of August 1843, the Court ought to have admitted such conduct as an answer to the plaintiffs' claim for a specific performance in this suit. Whatever the leaning of the Court in earlier times may have been, the tendency of the modern cases has been, to hold parties, seeking the assistance of the Court on bills for specific performance, to the letter of the law, which requires them to be prompt in asking its assistance; and certainly the peculiar nature of the property in this case, and the position of the purchaser respecting it, makes it a case in which, but for the acts of the parties in protracting the investigation of the title, the

Court might well have considered that time, if not of the essence of the contract, was extremely material in considering whether, after such delay, the Court will interfere in it. The question to which I have addressed myself has been, whether the acts of the parties during the interval between the 20th of August 1841 and the 30th of August 1843, has or not kept alive, for the plaintiffs' benefit, the right they had on the former day. There again, I may state a conclusion to which I have come upon this point, namely, that in considering how far the delay of the plaintiffs in instituting the suit is to operate against them, I think the interval between the 20th of August 1841 and the 17th of January 1842 must, as a mere question of delay, be excluded. The bishop's advisers, during that interval, have in the correspondence cautiously, and I think effectually, as far as they could do it, preserved to him such benefit, if any, as the mere act of declaring the contract rescinded on the 20th of August 1841 would give him; they have not declined continuing the examination of the title, or considering the expedients, in fact or by argument, by which the title might be shewn to be good, or made so; but this has always been done, and I think effectually done, under a protest, which gave to the correspondence, so far as the bishop was concerned, and had power to do it, the character of a treaty for the renewal of the rescinded contract, and not the continuation of an uninterrupted and subsisting contract. I cannot, however, think that the vendors were in any default by not having filed their bill, whilst that treaty, however modified by the protest of the purchaser, continued; and I therefore regard the treaty between the 20th of August 1841 and the 17th of January 1842, as material only for the purpose of shewing what was the position of the parties on that day, I mean the 17th of January 1842.

For the purpose of shewing this, I must briefly refer to that treaty, as shewn by the correspondence. Now, the first letter I refer to is one dated Saturday the 11th, Bishop's Nympton, without any other date; it is a letter from the bishop to Mr. Rickards, in which he says—"Dear Sir, as you have not been here, I conclude that some engagement prevents you. After I had the pleasure of seeing you yesterday, I received a letter from London, which satisfies me that a conference, such as you suggested, could not at present be held with advantage to either party; in truth, the opinion of my conveyancers, two gentlemen of high authority, is so decisive, as to compel a communication which you will receive from Mr. Barnes. You will judge whether it will not be your most advisable step to seek a personal interview with Mr. Barnes without delay; he is now at Exeter. I am myself going to Chumleigh, where I propose remaining till six o'clock; afterwards I go to Bishop's Morchard." That is signed by the bishop, and there is a postscript to it. "I have forborne to say anything here on the present position of the affair. My answer to inquiries has been, that legal delays prevent the very speedy settlement of the purchase." Then, on the 31st of August 1841, Mr. Barnes writes to Mr. Rickards, and says he is going to the continent; and adds these words, "It would be very desirable if I could understand from you when the deposit will be repaid." Then, on the 1st of September 1841, Mr. Rickards writes to Mr. Barnes—"The vendors conceive that they have shewn a title which, under the contract, the purchaser will be bound to accept. Of course, circumstanced as some of the vendors are (viz. trustees for sale for the benefit of creditors), they cannot permit the contract to be rescinded, if it can be enforced. All the papers, with a statement of all the circumstances, will be in a day or two laid before counsel for advice, and future proceedings will be regulated by the result. Of course, as matters now stand, the deposit cannot be returned, and we must consider the contract as binding." In this stage of the cause, I think it was, or just before notice of the bishop's claim had been served on the proper parties, that the bishop made a formal entry, on the ground that the lease of March 1823 was invalid. The lease to Mr. Saunders then was or had been granted to him, and in respect of that he was made a defendant in the suit; and the intimation also that the letter had been acted upon. I still, in making this statement, exclude the acts of the purchaser relating to Crosse Farm. Since the bishop gave that notice, since he had made that formal entry, since he granted that lease, there has not, in fact, been any beneficial occupation of the pro-

perty; that act, as far as it went, had the effect of putting the bishop in possession, and shewing the parties he was continuing to act on the notice; at all events, he was claiming to act by the title paramount, and not under the agreement.

As far as the bishop could, he meant to assert his right to claim under the title paramount. There is a difficulty about the circumstances on the subject of the ejectment. I understand, on the 14th of September 1841, Mr. Barnes wrote to Mr. Rickards a letter as follows:—"After my receipt of your letter of the 1st of September, the bishop deemed it necessary to act on the advice given to him; therefore, having been previously advised by counsel that the lease of 1823 was void, and that the lease of 1790 being in the events ended, the manor had actually reverted to the see, he thought it right to take the steps which, under the circumstances, were fit for him, as bishop, to take. And I have now to inform you that, acting under the advice of counsel, the bishop has accordingly proceeded to make an actual entry; and, declaring the lease of 1823 void, has executed a lease of the manor, with certain exceptions, to Mr. Ralph Saunders." Then, on the 24th of September 1841, Mr. Rickards writes to Mr. Saunders, and asks what are the specific objections to the title on which the bishop means to rely. Now this, I may observe, is the only letter from Mr. Rickards which appears to me not to be of a satisfactory character. From the former letters I have referred to, it was plain what the objection was, that interrupted the progress of the contract; it was that which arose out of the invalid execution by Ann Northcote of the power of appointment, of which she was donee under the will of Anne Southcomb. On the 24th of September 1841, Mr. Saunders to Mr. Rickards, says, "Distinct objections were taken to the title," and he refers him to Mr. Barnes's correspondence. The correspondence continued, and during the whole, as I before observed, the purchaser asserted his right to insist upon the notice given of rescinding the agreement on the 20th of August 1841; and Mr. Rickards, on the part of the vendors, not pretending that the power, executed by Ann Lewis Northcote, was well executed, insisted that the vendors had shewn a title, such as the purchaser was bound to accept; he denied the bishop's right to rescind, and proposed to remove the objection by getting the heir of Mrs. Northcote to join in the conveyance. On the 16th of November 1841, Mr. Saunders to Mr. Rickards, says, "that the offer to procure the heir of Mrs. Northcote to join comes too late;" and he points at a doubt whether such heir was known: he offers, however, to entertain the question without prejudice to the notice of the 20th of August 1841; and he concludes with these words—"In order to prevent any further delay in this protracted business, I must request that the information and evidence"—that is, as I understand it, of the heirship—"to be furnished within two months, and, if not perfected within that time, the parties will fall back to their original position under the rescinded contract." The correspondence then continues, respecting the heirship, on the same footing as before. Mr. Rickards, as I understand it, admitting, in a letter of the 6th of January 1842, that he had been inaccurate as to pedigree of the heirship previously given by him, Mr. Saunders objecting that the heirship was not made out. On the 17th of January 1842, which was the expiration of the two months limited in Mr. Saunders's letter, to which I have just referred, Mr. Saunders writes a letter of that date, which is in these words:—"Dear Sir,—The time having expired, mentioned in my letter of the 16th of November last, within which period certain requisites were to have been complied with, and this not having been done, I beg that you will most distinctly understand that it is the bishop's intention to fall back to his original position under the rescinded contract, and I have only, therefore, to refer you to Mr. Barnes's letter of the 20th of August last, and again demand the repayment of the deposit, with interest and costs." Before the 20th of January 1842, Mr. Rickards wrote to Mr. Saunders two more letters touching the heirship; and on the 28th of January 1842 Mr. Saunders wrote to Mr. Rickards this letter:—"Bishop's Nympton.—Your letter of the 24th of January, with the accompanying declaration of Thomas Evans and Sarah Jones, have been forwarded to me here, and I take the earliest opportunity of informing you that the contract

having been rescinded, I decline to give any consideration to the communication." Some further letters pass between the bishop and Mr. Rickards: the latest letter is dated the 28th of February 1842, relating principally to some insinuations which the bishop thought had been directed against him in a public paper. Mr. Rickards having disclaimed this publication in a letter dated the 28th of February, the bishop writes a letter, in which he says, that "whenever the proper time shall come I will act according to my own sense of what is liberal and becoming; meanwhile, you must not suppose that I wish you in any degree to relax in your endeavours to compel me to complete the contract I have been advised to rescind; no such endeavour, conducted in the ordinary manner, will indispose me to your clients." Then comes the letter to which I before referred.

At this point I consider the correspondence as ending for any of the purposes of this suit; and I have no evidence explaining the delay which took place after that, down to the time of filing the bill. I looked through the bill on the subject, and I do not find the bill makes any case on the subject of delay. The bill stops there. The position then of the vendors and purchaser in this case was this: on the 20th of August 1841, the purchaser had taken on himself to declare the contract at an end. For the reasons I have already mentioned, I have not considered the interval between that day and the 17th of January 1842 as furnishing an argument on the ground of delay merely; but in the interval, namely, on the 16th of November 1841, the purchaser gave notice, that if the title was not completed within two months from that day, he would fall back on his original position under the rescinded contract. When, therefore, the 17th of January 1842 arrived, the vendors were put at arm's length in contest with a purchaser, who first on the 20th of August 1841, and afterwards, on the 16th November 1841, had given notice of his intention to treat the lease of March 1823 as void, and had acted upon that (I still exclude the question about Crosse Farm), by entering upon the property and treating the lease as void, by holding the property adversely to the vendors, as far as he could do it; and if it had not been for the Crosse Farm, to which I have yet to refer, and to the fact that the bishop allowed the deposit of 1,600*l.* to remain unrecalled, there would not be a single act explaining why the vendors took no step towards enforcing this contract from the 17th of January 1841 until the month of May or June 1843, when the bishop brought ejectments, and also an action to recover back the deposit.

Upon this, the communication between the parties was renewed. Mr. Saunders says, "you know we consider the contract as at an end; but, nevertheless it was agreed that counsel should meet and see whether the difficulties could be overcome." The bishop's counsel, as I understand, are still of opinion that the objections to the title remained, and that the purchaser could not be advised or compelled to accept it; and if so, the bishop could not, of course, be advised to pay his purchase-money to a party who, upon the supposition that the plaintiffs could not shew a good title, were not the parties entitled to receive it. The life of Mr. Hole, it will be remembered, kept alive the old lease intended to be surrendered in March 1823; he is now alive. I will next advert shortly to the cases which were cited by the counsel as bearing upon the plaintiffs' delay. They were all, except *Taylor* v. *Brown* (1) and *King* v. *Wilson* (2), examined by me in *Walker* v. *Jeffreys* (3). The excepted cases appear to me to follow up and confirm the principle of those I have referred to. With respect to the cases of *Stewart* v. *Smith* and *Cooper* v. *Emery* I had a strong impression that they were both reported, but I think my belief on that point has arisen from my having been furnished by Mr. J. Russell with a note of the cases as they were prepared for reporting; they were in manuscript and were prepared, but were never published. If we are not to have any more reports from Mr. Russell, he will do the profession some good by allowing them to be published for him. With respect to the case of *Stewart* v. *Smith*, in which I was counsel, my own note of it is this: "Bill by vendor for specific performance of agreement. The defence was,

(1) 2 Beav. 180; s. c. 9 Law J. Rep. (N.S.) Chanc. 14.

(2) 6 Beav. 124.

(3) 1 Hare, 341; s. c. 11 Law J. Rep. (N.S.) Chanc. 209.

that the abstract was never so far perfected as to enable the defendant to lay it before his counsel; that he had several times demanded back his deposit, and declared the contract at an end; that on the 5th of December 1817 he had by letter waived his former notice of abandonment conditionally that the contract should be immediately completed; and that, on the 8th of April 1818, he had by a letter which referred to the former letter of the 5th of December 1817 declared the contract at an end for the last time; and that the plaintiff had taken no step whatever, or noticed the subject till the 17th of May 1819, when he renewed the subject by letter; but the defendant declared that the contract was at an end. The contract to sell was dated on the 20th of December 1815, and the bill was not filed till the 26th of October 1820; the notice would, of course, bear date at the time it was given, that is, the 8th of April 1818, and they declared it was immediately completed in December 1817, and though immediately completed, he would not complete his contract. *Horne* and *J. Wigram*, for the defendant, contended, that it was enough that the defendant should prove laches in the plaintiff without shewing that a time was specified by him in his notice of abandonment, and cited the cases of *Hayes* v. *Caryll* (4), *Spurrier* v. *Hancock* (5), *Harrington* v. *Wheeler* (6), *The Marquis of Hertford* v. *Boore* (7), and *Alley* v. *Deschamps*" (8). Those cases were referred to, some of them, in the argument of this case also.

Now, the Vice Chancellor's judgment as I took it down at the time was this: "The letter of the 8th of April 1818 says, it is useless to proceed unless the evidence required to complete the abstract be produced; that, in other words, is saying, I am willing to proceed if evidence is produced: and as that letter does not specify any time within which the evidence is to be produced, I am of opinion that upon that letter only, the defendant could not resist the performance of this agreement; but that letter refers to another letter, dated the 5th of December 1817, in a manner which authorizes me to consider the two letters as one; and in the letter referred to, which was written after the second notice of abandoning the contract, the defendant, in substance, says, he waives his notice of abandonment conditionally only that the evidence in question is immediately (that word was in the letter) produced. Now, as it is clear, according to the present law of the Court that express notice will make time of the essence of the contract, where a time is specified, and as it is clear that the plaintiff has done nothing since April 1818, dismiss the bill." I think in *Cooper* v. *Emery* the bill was not dismissed; but it was a very long and complicated case.

My decision in the present case should, I think, be governed by those cases I have referred to, subject only to the question, whether the plaintiffs' right is not saved by the points I am about to notice. The first relates to Crosse Farm; and upon all that is found in the admissions between the parties, it appears to me to be a clear question of arrangement between both parties; it refers, throughout the correspondence and the admissions, to the agreement as to what was to be done with respect to Crosse Farm; that that clearly was the effect of what was done by these parties. Secondly, assuming the case to be in other respects clear, I am satisfied it was not necessary that the bishop should have first given up possession of the property, taken under the circumstances I have already mentioned, before he insisted on rescinding the agreement. One point was that the bishop, having more or less acquired such possession as he had, in consequence of the contract, could not retain that possession and at the same time contend that the contract was void. It does not appear to me that the bishop was bound to have done that. I have attended to it here, because it appears a point was made of it in the case between the parties. The third point was about the deposit, I understood the money to be *in medio;* if so, it was more favourable to the defendant's case than it is now; because it appears the money having been paid to the plaintiffs, the bishop was, in some sense, leaving the contract in part performed while the money remained there. All that, however, was to the prejudice of the bishop himself after notice had been

(4) 5 Vin. Abr. 538.
(5) 4 Ves. 667.
(6) Ibid. 686.
(7) 5 Ibid. 719.
(8) 13 Ibid. 225.

given, and the case of *Watson* v. *Reid* (9), one of the cases cited in *Walker* v. *Jeffreys*, shews that the omission to require repayment of the deposit will not deprive the party of his right to insist that the contract is rescinded, where he had taken other steps for the purpose. That is an authority; but I do not think authority is wanted on the subject. The fourth question is this: supposing that a good title had not been shewn on the 17th of January, then the question would be, whether I could then have disposed of the case. Mr. Parker has argued, that if a good title had in fact been shewn on that day, the bishop has been in the wrong ever since that time, and the Court ought not to dismiss the bill; and that that fact ought to be ascertained. The question on that will be, whether I am now to refer it to the Master to inquire whether a good title had been shewn on the 17th of January. It appears to me I ought not; I am not bound to accede to that argument. I think the mere statement by the party that he has made a good title, is not enough. I thought myself bound to attend to the argument on the title, as far as was necessary to satisfy myself that the bishop was not liable; and being well satisfied of that, and to say the least, being satisfied also that the vendors would have great difficulty in persuading a court of equity to compel a purchaser to accept such a title, I think the cases I have before mentioned apply. I think it is not enough for the vendors to say, "We insist you are bound, and we will enforce it by a bill," and afterwards they file a bill; they cannot by that threat put themselves in a better position than if they had acquiesced. Nothing, in fact, was done from the 17th of January 1842 to the 30th of August 1843, notwithstanding the vendors had notice on the 20th of August 1841, that the bishop meant to treat the contract as rescinded, and gave the express notice of abandonment I have mentioned. With the exception of as much of the costs of this suit as have been occasioned by the supplemental answer filed by the defendant, I think the bill must be dismissed with costs.

Mr. Romilly.—I am instructed on the part of the bishop to say, he is now willing, as he was then, subject to the payment of his costs, to give the full amount of the purchase-money to these parties, and also to give the sub-tenants full equivalents for their leases.

(9) 1 Russ. & Myl. 236.

WIGRAM, V.C.—That circumstance has not affected my judgment in the slightest degree; but as the taking advantage of a defect of this kind, where a party who takes the advantage has the means of curing it, for his own benefit, might seem to be a discreditable thing, I thought it right, after what had taken place in the correspondence and on the argument of the case, to shew what the truth of the case was.

Mr. Romilly then asked, that the decree might direct the return of the deposit.

His Honour said, he had a recollection of a case before Lord Brougham where that was done; but that he would look into the point.

M.R. May 29, 31; June 8. } WILKINSON *v.* CHARLESWORTH.

Baron and Feme—Equity—Settlement—Choses in Action—Principal and Income—Survivorship.

A wife's equity to a settlement applies as well to the income as the principal of her choses in action; and income which accrued due during the husband's lifetime, but was not reduced by him into possession, will pass to the wife by survivorship.

Edward Manners, by will, dated the 3rd of March 1801, gave to Rosilia Thoroton and Harriet Thoroton 12,000*l.*, equally to be divided between them, share and share alike; and he thereby subjected his real estates, situate in Yorkshire, to the payment thereof, after the decease of Ann Stafford, who died in the year 1827. In the meantime, H. Thoroton married John Byng Wilkinson: those parties separated shortly after their marriage. In the year 1813, J. B. Wilkinson received the appointment of paymaster of one of her Majesty's cavalry regiments, when his brother James Wilkinson became his surety for his duly

performing his duties to the extent of 1,000*l.*; and by deed, dated the 2nd of August 1813, J. B. Wilkinson took on himself to assign to Thomas William Hill and J. Wilkinson the reversionary interest in one moiety of the above-mentioned sum of 12,000*l.*, (claimed by him in right of his wife) in trust to save harmless and indemnify the said J. Wilkinson with reference to his situation of surety, and subject thereto, upon trust, to secure payment of 2,000*l.* to Elizabeth Wilson and Frances Wilson, the two natural daughters of J. B. Wilkinson. In 1821 J. Wilkinson was called upon by government to pay, and did pay, the sum of 1,000*l.*, as the surety of his brother J. B. Wilkinson. On the 30th of April 1824, whilst living separate from J. B. Wilkinson, and believing herself to be a single woman, H. Wilkinson assigned to the Reversionary Interest Society her reversionary interest in the said sum of 12,000*l.* The intermarriage of J. B. Wilkinson and H. Thoroton having subsequently become known to the Reversionary Interest Society, they obtained a confirmation from J. B. Wilkinson of the sale to them by the said Harriet Thoroton of her reversionary interest, by a deed, dated the 24th of July 1826. On the death of A. Stafford, Caroline, the widow and sole executrix of J. Wilkinson, (and who afterwards intermarried with Robert Malcolm) filed a bill against the parties, the devisees named in E. Manners's will of his real estates, and against J. B. Wilkinson and Harriet his wife, E. Wilson, Edward Archdeacon and Rosilia his wife (formerly R. Thoroton), Edmund Wrinkle, and Frances his wife (formerly Frances Wilson), and Thompson, Bell, and Chapman, who represented the Reversionary Interest Society, seeking to have the sum of 12,000*l.*, raised out of E. Manners's estates, and payment out of one moiety thereof of the amount to be found due to her, on taking the proper accounts, and that the residue thereof might be paid in manner directed by the deed of the 2nd of August 1813. The plaintiff's claim was resisted by the Reversionary Interest Society; and the question at the hearing was between those parties, J. B. Wilkinson and wife being co-defendants to the suit, the husband being only entitled in right of his wife, subject to her equity to a settlement. By the decree made in the cause on the 16th of February 1836, it was declared that the plaintiff was entitled to the relief sought by the bill, and it was expressly declared that the defendant H. Wilkinson was entitled to a settlement, to be made upon herself and her issue, with reference to the whole sum in question; but such settlement was to be without prejudice to any question between the said H. Wilkinson and Thompson, Bell, and Chapman; and it was ordered that it be referred to the Master to approve of such settlement accordingly; but, inasmuch as the surplus of the said fund, after satisfying the plaintiff's claim, would be sufficient to answer such settlement, it was directed that the claim of the plaintiff was to be paid at once, and not to be postponed till such settlement was made; and the Master was ordered to state to the Court whether H. Wilkinson executed any and what deed or deeds to Thompson, Bell, and Chapman, and under what circumstances, and whether J. B. Wilkinson ratified and confirmed the same. The Master, by his separate report, dated the 19th of February 1839, certified the amount due, under the aforesaid devise, contained in E. Manners's will, for principal and interest, and out of the sum of 8,800*l.*, which was carried to an account entitled the account of the defendant J. B. Wilkinson and Harriet his wife, the sum of 2,150*l.* 11*s.* 10*d.* was paid to the plaintiff, in satisfaction of the amount due in respect of the security of the 2nd of August 1813; and the residue thereof was afterwards laid out in the purchase of 7,075*l.* 1*s.* 4*d.*, Bank 3*l.* per cent. annuities, in trust in the cause, the account of the defendants, J. B. Wilkinson, and Harriet his wife. The Master, by his general report, dated the 1st of May 1844, found that the draft of an indenture of settlement had been laid before him, intende to be made between the said H. Wilkinso of the one part, and certain persons trustees therein named, of the other pa whereby it was proposed to settle the s sum of 7,075*l.* 1*s.* 4*d.*, Bank 3*l.* cent. annuities, with the devisees ther after the payments directed by the de had been made, upon trust, for Ha Wilkinson, for life, for her separate use, after her decease in trust for her childr she should by deed or will appoint, a

default of appointment, for all the children of Harriet Wilkinson, equally, and in default of children, in trust for such persons as she should appoint, and in default of appointment, in trust for her next-of-kin; and the Master, by his general report, stated that he approved of such proposed settlement; and it having been stated and admitted before him, that J. B. Wilkinson had died since the date of the decree, the Master submitted to the Court whether such settlement was necessary or proper to be executed. Harriet Wilkinson presented a petition to the Court, headed in the causes, whereby, after stating to the effect aforesaid, and that, under the circumstances aforesaid, she was entitled to the whole of the sum of 7,075*l.* 1*s.* 4*d.* Bank 3*l.* per cent. annuities and 309*l.* 1*s.* 9*d.* cash, then standing to the credit of the causes, without prejudice to any question between her and the defendants Thompson, Bell, and Chapman; and that, in order to prevent the delay and expense attending the prosecution of the inquiry directed by the decree, as to the circumstances under which the deed of the 30th of April 1824 was executed, the petitioner, and Thompson, Bell, and Chapman then agreed to waive the said inquiry, and that the sum of 250*l.* should be paid to the petitioner out of the fund standing to the credit of the cause, the account of J. B. Wilkinson and Harriet his wife, together with the costs of the suit, and of obtaining the separate report, and the costs of the present application; and that the remainder of the said legacy and interest should be paid or transferred to the defendants Thompson, Bell, and Chapman, pursuant to the indenture of the 30th of April 1824—it was prayed that so much of the 7,075*l.* 1*s.* 4*d.* 3*l.* per cent. annuities, as would be sufficient to raise what the Master should certify to be the amount of such last-mentioned costs, and the said sum of 250*l.* might be sold; that such costs might be paid to the petitioner's solicitor, and the sum of 250*l.* to the petitioner; and that the residue of the said sum of 7,075*l.* 1*s.* 4*d.* Bank 3*l.* per cent. annuities, together with any dividend to accrue due thereon, and the sum of 309*l.* 1*s.* 9*d.* cash, might be paid and transferred to Thompson, Bell, and Chapman.

The cause coming on to be heard on further directions, and on the last-mentioned petition, it was contended, on behalf of the defendant Elizabeth Wilson, that the deed of the 2nd of August 1813, by which the sum of 2,000*l.* was settled on her and her sister (who was out of the jurisdiction of the Court), was entitled to priority over the subsequent deeds of the 30th of April 1824 and the 24th of July 1826; and that as the interest of Harriet Wilkinson fell into possession during the lifetime of J. B. Wilkinson, she, Elizabeth Wilson, was entitled in priority to the wife's right by survivorship and equity to a settlement, and that she, at least so far as the dividends which became due during the lifetime of J. B. Wilkinson were concerned, was entitled to such priority, whether J. B. Wilkinson did or did not maintain his wife during his lifetime.

For the petitioner it was insisted, that the deeds executed during her husband's lifetime did not controul her right by survivorship, and that her equity to a settlement affected as well the dividends which accrued, but were not received during her husband's lifetime, as the principal sum itself.

Mr. Stinton appeared in support of the claims of Elizabeth Wilson.

Mr. Kindersley appeared in support of the petition of Mrs. J. B. Wilkinson.

Mr. Turner and *Mr. Sidebottom*, for the Reversionary Interest Society, represented by the defendants Thompson, Bell, and Chapman; and

Mr. Roupell, for the plaintiffs.

In the course of the arguments of counsel the following cases were cited:—

Davenport v. *Bishopp*, 2 You. & Col. C.C. 451; s. c. 12 Law J. Rep. (N.S.) Chanc. 492.

Vaughan v. *Buck*, 13 Sim. 404.

Ellison v. *Elwyn*, Ibid. 309; s. c. nom. *Elwin* v. *Williams*, 12 Law J. Rep. (N.S.) Chanc. 440.

Le Vasseur v. *Scratton*, 14 Sim. 116.

Murray v. *Lord Elibank*, 10 Ves. 84.

Pierce v. *Thornely*, 2 Sim. 167.

Ashby v. *Ashby*, 1 Col. 549; s. c. 14 Law J. Rep. (N.S.) Chanc. 86.

The MASTER OF THE ROLLS, at the close of the arguments, stated that possibly the case that had been cited before him, and decided by the Vice Chancellor of England, might not have been very successfully reported, but he would look at it, as well as the other authorities, before he decided the

point as to the dividends which accrued during J. B. Wilkinson's lifetime. As regarded the principal of the fund, his Lordship was of opinion that nothing had occurred to affect Mrs. Wilkinson's interest in it.

June 8.—The MASTER OF THE ROLLS observed, that it had been argued that the wife's right to a settlement did not extend to the dividends which had accrued during her husband's lifetime, but that his personal representative was entitled to them. The cases of *Ball* v. *Montgomery* (1), *Wright* v. *Morley* (2), and *Jacobs* v. *Amyatt* (3), were opposed to that position; and it had been the constant practice of the Court, so far as he was acquainted therewith, to give effect to the wife's claim to a settlement as to both principal and income. It had been contended that if the wife had been maintained by the husband, he was entitled to the interest which accrued due during his lifetime; that performing the obligations consequent on the contract of the marriage, he became the absolute purchaser of the rights of the wife: and it was further said, that if the husband died without having reduced into possession the income that accrued during his lifetime, his personal representative was entitled thereto against the wife surviving: but such argument was quite against the practice of the Court. When a husband applied for money in court, in right of his wife, be the same capital or income, the question asked always was, whether any settlement had been duly executed, and, if not, whether the wife consented to the payment of the fund to the husband. If she did not consent, then the question was, what ought to be the settlement on her; and, if necessary, it was referred to the Master to ascertain what would be a proper settlement to be made. She was not entitled to the whole either of the capital or income to be paid to her alone to the total exclusion of the husband, unless special circumstances justified such a course; and cases might arise under which the wife might be deemed not entitled to have any settlement made on her out of the particular fund in question; there was no fixed rule on the subject, but it was not unusual for the parties to agree on some fixed sum to be settled: the matter was always inquired into by the Court. The title of the husband to the wife's funds, subject to her right to a settlement thereout, was clear; and up to the present time he did not recollect any instance of the husband's title being disputed: two cases, however, had been cited in argument to the contrary, on the part of Elizabeth Wilson, viz. *Macaulay* v. *Phillips* (4), and *Vaughan* v. *Buck*; and the cases of *Bond* v. *Simmonds* (5), and *Sleech* v. *Thorington* (6), might be thought to bear on the subject; but the observations made by the learned Judges in those cases were founded on the notion that the life interest of the wife was the subject on which the wife's equity to a settlement would attach. In the case of *Wright* v. *Morley*, Sir W. Grant was alleged to have said that Lord Alvanley would have admitted that where the property of the wife consisted only of a life interest, the husband would be entitled to that in her right, without making a settlement, as a general proposition; but he decided the contrary in the case in which he made the observation. His Lordship then said he considered it settled that the husband was not entitled to the wife's life income except subject to her equity to a settlement, and there was nothing in the present case to shew that the ordinary practice of the Court was wrong. He had had forwarded to him the papers in the case of *Vaughan* v. *Buck*, and a copy of the order made therein, and the case did certainly seem an authority for the argument used on the behalf of Elizabeth Wilson; but that authority did not govern the present case, inasmuch as in the former case both husband and wife were living when the decision was pronounced: but considering how constant the practice of the Court had been in cases like the present, and the importance of the subject, his Lordship considered he was bound to say he could not, under similar circumstances, make a similar order. It was also argued that the Court must presume that the husband maintained his wife during his lifetime, and that he thus acquired an independent right to the income that accrued during her lifetime, which ceased to be a chose in action after it had become due, and thus passed to his personal

(1) 2 Ves. jun. 191.
(2) 11 Ves. 21.
(3) 1 Madd. 376, note.
(4) 4 Ves. 15.
(5) 3 Atk. 20.
(6) 2 Ves. sen. 560.

dalen, Oxford, and was formerly the Hospital of St. James, afterwards dissolved. It did not anywhere appear when the school-room was first built, except that it was built previously to the promulgation of the statutes for the regulation of the college, and on ground immediately adjoining thereto, and separated from the walls of the college only by a narrow lane, and in 1480 scholars resorting to the university were taught in that school-room. A grammar-school was at the same time founded, by W. Waynflete, at a town of that name in Lincolnshire. In the same year the building of the hall was commenced, and in the register of the college it was stated that payments of 10*l.* and 5*l.* were made to the master and usher, respectively; and, in 1481, the first president of the college was appointed. In 1483 the document containing the final statutes was executed, written in the Latin language, whereby it was enacted that the aforesaid college at Oxford should consist of the number of one president and forty poor and indigent scholars, being clerks, whose duty it should be to study the sciences; and he, W. Waynflete, willed that the same number should for ever remain, in addition to which number there were to be other thirty poor scholars, commonly called demeys, who were diligently to learn grammar, logic, and sophistry; and he willed, that, beside the said scholars, there should be also four chaplains, who should be priests, eight chaplains who should be clerks, and sixteen quiristers (choristers) in attendance, in the chapel of the said college, at the divine services; provided that out of the forty scholars two or three, by the special leave of the president, vice president, deans, and three other seniors, should have power to study in the canon law, and the civil, and other two or three in medicine. W. Waynflete then proceeded to give directions concerning the mode of election of the president, vice-president, and forty scholars or fellows, deans, and other officers connected with the college, and the oaths to be taken by them respectively; and he enacted that there should be over and above the number of forty scholars aforesaid, other thirty poor scholars commonly called demies of good morals and dispositions, and able and likely to make real proficiency, competently instructed, in reading and plain singing, and who should have arrived at their twelfth year; and, "moreover, because a weak foundation does but mock the superstructure, as experience teaches, and also inasmuch as we have understood that certain of our thirty scholars have lately been in the habit of turning aside at too early a period to logic and sophistry, before they have been sufficiently instructed in grammar, which is demonstrably the mother and foundation of all sciences, we also enact that no one of them be henceforth admitted to sophistry and logic, or other science, unless he be first found fit and competent thereto, in the judgment of the president and the master informer in grammar and one of the deans of the college; and we further enact that at the command of the president, with the advice of the others as aforesaid, two or three of the thirty, at least, shall diligently apply themselves and devote their labours to the mysteries of grammar and to verses, and the other arts of humanity for such space of time that they may not only be of advantage to themselves, but may be able and have power to instruct and inform others also, and have skill and competency for that purpose." The document then proceeded as follows:—"inasmuch as with the greatest and most glowing desire of heart we covet the diligent, profound, and assiduous instruction, not only of the scholars and fellows of our college aforesaid, but also of all and singular other students, especially those who devote themselves to the faculties of philosophy and sacred theology in the university of Oxford, and the advancement and speedy accomplishment of the same parties in the said science and faculties, we do enact, that, for all future times, there be in our college aforesaid three lecturers, fully endowed with the graces for lecturing, morals, and sciences; two of these are to be masters of arts, who are openly and publicly to lecture on philosophy to all and singular the scholars, as well of our college, as others also, who from any quarter flock to the said college, and who are desirous of hearing the said lectures, and they are to demand nothing from their hearers." It was then ordered that one of the masters of arts should lecture on natural philosophy, and the other on moral or metaphysical philosophy, and

the third lecturer, being a doctor, bachelor, or scholar in divinity, was to openly lecture, at the costs of the college, in sacred theology, to all and singular the scholars who resorted thither from all quarters and wished to hear such lectures. It was next enacted, "that there be in the college one master or informer in grammar, to be alike hired and removed by the president, who is freely and gratuitously, without exacting anything, to inform, teach and instruct with the greatest diligence, and in the most expedient manner all persons whomsoever who may attend the grammar school, which is built and situate hard by our college aforesaid; also under the said master there is to be one usher, engageable and removeable in form aforesaid, who is freely and gratuitously and without the demand of anything to inform and instruct, subordinately to the aforesaid master, the said persons who attend it, and in all things to take upon himself and supply the duties of the said master when the latter is absent; and our will is that such master be paid 10*l.* and such usher 100*s.*, by the year, out of the common goods of our college, in addition to their chambers and weekly commons, which commons we would have to be equal to those of the fellows of our college. Moreover, lest to the decrease of learning the aforesaid schools shall be bereaved of a due master or usher, our will is, that when either of them is going to withdraw from his office for good, he give the president six months' warning of his retirement, and if either of them should be found by the president inadequate to the performance of his office, they or either of them found blameable in the premises shall for three months be admonished by the president, and such monition of the president we will that they obey, to all intents; and after the monition of the master and usher or either of them, we will that the president do with all possible speed make search in likely places for a new master or usher, or one of them, according to the exigence of the case, and with them or one of them do provide for our school aforesaid within three days after the retirement of the former masters or one of them. Moreover, we forbid any fellow or scholar of our said college to maintain, countenance or defend by word or deed any scholar of the said grammar school against the aforesaid master, instructor, or usher, so as to prevent his due correction or chastisement by the same masters; and we enjoin that they do not hinder any one of the said scholars in his study or learning, or lure him out without the president's leave, or in his absence, against the wish of the vice-president and the master and informer of the college aforesaid; and in order to the performance and faithful observance of all and singular the aforesaid particulars, and all other matters commanded by these presents so far as they concern the same master and usher or either of them singly, our pleasure is that they do take their corporal oath on touch of the Holy Gospels before the president and vice-president aforesaid at the time of their first admission. Moreover, seeing that we have built and founded another grammar school in the town of Waynflete, in the diocese of Lincoln, beside and in addition to the said grammar school at Oxford, which is to last with God's blessing throughout all future times, we therefore enact, in order to the happy performance of the same school, that one hired master or informer in grammar already in priest's orders if such an one can readily be had, be for ever delegated and appointed and preferred to the same school by the president of our college, with the advice of the vice-president and one of the deans; and 10*l.* sterling out of the goods of our college aforesaid, that is to say, out of the profits and rents arising in the said county of Lincoln, are to be provided, assigned and paid him every year at the four terms of the year, or immediately afterwards by equal portions for his salary and labour. This master also, or informer, who is in manner aforesaid to be alike engaged and removed by the president, is to inform, teach and instruct freely and gratuitously without demanding anything, and in the most profitable manner, all parties whatsoever going to the said grammar school; and also, if he be a priest, he is to pray specially during his masses for our soul when we have departed this life, and for the soul of W. Anlellar and other benefactors of the same school." The founder then proceeded to further enact as follows, that is to say:—"Forasmuch as we yearn with the highest and most glowing zeal of heart for the diligent and assiduous instruc-

tion of the fellows and scholars of our college, and the manifold proficiency and notable accomplishment of the same persons, we have thought good to assign for ever the sum of 100*s.* out of the common goods of our said college for the instruction of our said fellows and scholars, we enact that one or more persons in the faculty of logic and sophistry, as shall seem most expedient to the president and one of the deans of the said college, shall be assigned and also to good purpose appointed amongst such fellows of the said college as are competent and approved of for knowledge of literature and propriety of conduct, over all and singular the fellows, scholars and clerks of our chapel, who are to learn and attend lectures in the aforesaid faculty for three complete years, or even four, which are to be counted continuously from the time of their first admission to our said college, if that should seem to be expedient to the president and one of the deans, in order that these lectures may instruct such younger fellows and scholars. But we will that 6*s.* 4*d.* sterling out of the common goods of our college be paid yearly for all future times, by the hands of the bursars for the time being, in behalf of every such fellow, scholar and clerk during the aforesaid term of three or four years as aforesaid, in addition to all the other sums which the same informer or such informers would otherwise receive from the same college." The founder then, after appointing the Bishops of Winchester in succession to be the visitors of the college, and giving them power to convene the president and all and each of the scholars and fellows of the college, gave to such reverend father and his commissionaries full power to inquire most searchingly touching all and singular points and articles contained in his said ordinances and statutes, by means of the president and all and each of the said fellows and scholars; and in like manner touching all and singular matters which concern the state, welfare and credit of the said college, and what particulars in the said college and the persons thereof they know and believe ought to be reformed (barring secrets), even though they should not be specially asked concerning them, and also the power of punishing the excesses, neglects, crimes and delinquencies of any persons whomsoever of the said college, in whatever way committed, according to the exigence and enormity of such excesses, neglects, crimes and delinquencies, and also the power of duly reforming attempts made against the ordinances and statutes aforesaid, and of doing, exercising and despatching all and singular the other matters which are indispensable in and concerning the premises or anywise seasonable, "even though he should chance to take proceedings for the privation or removal from his administration or office of the president, vice-president, or any other officer whomsoever, or for the removal of any fellow or scholar of our said college from the same our college, if such our statutes and ordinances so require."

There had been formerly a hall attached to the college, which existed during the lifetime of the founder as already stated, and was distinct from the college and standing upon ground which was the property of the college, and the hall had a refectory and other buildings belonging to it. At the time of the foundation of the college, and for a long period afterwards, the scholars of the college were elected at a very early age and attended at the college school, and they continued so to attend in the school during the reign of Queen Elizabeth until the age at which young men resorted to college had altered to eighteen or nineteen years, and since that alteration the scholars of the college had not required to be taught in the school, and the same had been principally used for the education of the choristers of the college, who received their education gratis. It was, however, admitted by the answer, that boys frequented the school from the city of Oxford generally; but that the boys made payments to the master and usher for their education when not sent thither by the college authorities. Hertford College in the university of Oxford was dissolved in or about the year 1816; and in pursuance of the provisions of an act of parliament passed at that time, the establishment of Magdalen Hall was transferred to the site of Hertford College, near to the Schools and Theatre of the university; and about the year 1828 the college obtained possession of the ancient site of Magdalen Hall, and pulled down the buildings thereof, inclusive of the school, and provided an interim room in the college for the instruction of

the choristers of the college. Subsequently to the death of the founder, and in particular in the years 1520, 1576 and 1665 appeals were made to, and other visitorial jurisdiction was exercised, by the Bishops of Winchester, as the visitors of the college, respecting the distribution and division of the yearly revenue of the said college, the misconduct of the master and other matters, and those visitors admonished the master, and made rules and regulations in particular cases touching the affairs and discipline of the college. It was insisted by the college in their answer, that the master and usher in grammar were part of and not distinct from the original foundation of the college, and subject to the jurisdiction of the Bishop of Winchester, the visitor of the college, and not to the Court of Chancery; that no separate property whatsoever had been given in trust for the school as a foundation distinct from the college, and that the school was on a different footing to that founded by W. Waynflete, at Waynflete in Lincolnshire.

Mr. Kindersley and *Mr. Bates*, in support of the information, contended that the school in question was founded as a free grammar school, and was not part of the college establishment, and stood on the same footing as Waynflete school founded about the same time, which was admitted to be a free grammar school, and for the support of which no particular trust property was given; that there was a trust imposed by the founder on the college to maintain a schoolroom, and a master and usher to teach all boys who might flock thither for instruction, whether from the town of Oxford or elsewhere; that a school in which the public had an interest could not be called a component part of the college; that the visitor of the college was only pretended by the defendants to be the visitor of the school by reason of his being the visitor of the college, although the school was to be considered quite distinct from the college; the lecturers also to the college were by the statutes to become fellows, whereas the master and usher were to be hired, appointed, and removed when necessary by the president of the college.

Mr. Turner, *Mr. Roundell Palmer*, and *Mr. Borrett*, for the president and scholars of Magdalen College, contended, that the only object of the founder was to establish a college; that there was no private trust in the present case for the support of the school in question, there being not a single acre of land set apart or in any manner appropriated to the maintenance and support of the master and usher, and grammar schools were not common when the college was founded; that there was no trust for the benefit of the public, neither would the Crown interfere with the heads of the college, where a visitor was appointed, as in the present case; that the case before the Court was novel in its nature, and not governed by any former one, being the case of a school-house built on land absolutely conveyed to the college, as part of the college property, and under royal charter authorizing the conveyance; that the mere possible right of private individuals to take advantage of some portion of the institution gave no jurisdiction to the Court of Chancery over the funds of the college or its officers; that if this Court were to interfere as to the stipends to be paid to the master and usher of the school, and the rooms to be occupied by them in the college, there would be a conflict of jurisdiction between the visitor and this Court; that the founder, after the establishment of the college, could not alienate any part of the property, or impose an improper trust on it, and both grammar school and lecturers were to form part of the foundation; and the duties of the latter, n doubt, were to be as extensively beneficial as possible.

Mr. Kindersley, in reply.

The following authorities were referred to during the argument of the case:—

The Statutes relating to Magdalen College, translated by Ward, pp. 23, 39, 59, 66, 84, 86, 131, 133, 165.

Chandler's Life of Bishop Waynflete, p. 375.

Attorney General v. *Smythies*, 2 Myl. & Cr. 135; s.c. 6 Law J. Rep. (N.S.) Chanc. 35.

Ex parte Berkhampstead Free School, 2 Ves. & Bea. 134.

Attorney General v. *Mayor of Bristol*, 2 Jac. & Walk. 294.

Attorney General v. *Catherine Hall*, Jac. 381, 385.

Attorney General v. *Skinners' Company*, 5 Sim. 596; and 2 Russ. 407.

Attorney General v. *Brazen Nose College*, 2 Cl. & Fin. 295.
Attorney General v. *Caius College*, 2 Keen, 150; s.c. 6 Law J. Rep. (N.S.) Chanc. 282.
Philips v. *Bury*, 1 Lord Raym. 5.
Attorney General v. *Talbot*, 3 Atk. 662; and 1 Ves. sen. 78.
St. John's College v. *Todington*, 1 Burr. 158.
The King v. *Grundon*, Cowp. 319.
Attorney General v. *Dulwich College*, 4 Bea. 255.
Attorney General v. *Middleton*, 2 Ves. sen. 328.
Attorney General v. *Foundling Hospital*, 2 Ves. jun. 42.
Ex parte Kirkby Ravensworth Hospital, 15 Ves. 305.
Corpus Jur. Canonici, p. 1087, title 10, Leipzic edit.
Cardwell's Synodia, vol. 2, p. 485, Act 43 Eliz. c. 413.
Duke's Charitable Uses, by Bridgman, p. 171.
Ward's Life of Fox; and 2 *Wood's Annals of Oxford*, pp. 103 and 712.

The MASTER OF THE ROLLS, after stating the facts of the case, delivered his judgment to the following effect:—It had been said, in support of the information, that by the above statutes a grammar school had been founded in Oxford, and that a trust had been thereby imposed on the college to maintain the school and support the master and usher in a proper manner, and that those persons were entitled to participate with the president and scholars in the increased revenues of the college; but the defendants seemed doubtful whether they ought to admit that the school was ever founded in the proper acceptation of the term, and, by their answer, they denied that it had ever been founded at all, except in the sense in which W. Waynflete said, in his statutes, that he had founded the school in his college, or that the said school had any revenue or property of its own distinct from the college; and they further say, that the master and usher of the school are only college officers or instructors. The defendants admit that the stipends of the master and usher of the school are fixed by the statutes; but they deny that the master and usher have any right to receive the increased salaries paid to them by the college from time to time, previously to the filing of the information, beyond the stipends fixed by the statutes. The defendants also state in their answer that the founder has given no property of any kind in trust for the school, or for the master or usher thereof; and they submit that this Court has no jurisdiction in the matter in question in the cause, and that the visitor of the college is the proper person to determine such matters. By the statutes the Bishop of Winchester for the time being was appointed the visitor, with full power to visit the college and convene the president, scholars, and fellows, and to institute inquiries touching all matters connected with the condition, welfare, and credit of the college. The founder, W. Waynflete, died in 1486, having, for a time at least, supported the master and usher at his own expense; and those persons afterwards received their appointed stipends from the college. On the 28th of June 1487, during the presidency of Richard Mayew, the president and scholars, not the president alone, as it is said, granted to John Armaykill, the informer of the grammar scholars, in the school adjoining the college, the annual sum of 10*l.*, for the term of fifteen years, and one tenement of the college, to be assessed to him for the same period, at the discretion of the president. As the clause in the statutes by which the visitor is appointed does not mention the schoolmaster by name or description, the visitor could have authority over him only in respect of his being an officer of the college, and employed in the discharge of duties imposed on the college. The duty being imposed on the college, the visitor had to inquire into its performance, and to reform any abuse that might exist; and such seems to have been the understanding, for in the year 1520 Bishop Fox, the then visitor of the college, charged the president with negligence with reference to the instruction of the boys in grammar, and after receiving the answer of the president, the schoolmaster was admonished by the visitor, and desired to use more diligence in the instruction of his scholars for the future: and, before the visitations held in the years 1576 and 1585, the visitor issued the usual citations to the president of the college, directing him to summon the members of the college to attend

him; and it appears from the answer of the president to the citation, that on those occasions the schoolmaster and usher attended the visitor. The principal question then was, whether the visitor of the college or this Court was the proper authority to correct any errors or abuses that might have crept into the management of the school. If on the true construction of the instrument, the college were trustees for the maintenance of a free grammar school for the use of the public, or a school for the instruction in grammar of persons resorting to it, this Court having power to execute the trusts, any breach of trust ought to be taken notice of by this Court in the exercise of its ordinary jurisdiction; but if, on the true construction of the statutes, the schoolmaster and usher were to be deemed only officers appointed and to be appointed by the college, to perform certain duties assigned to them by the college, in instructing such persons as might attend them, and the duty of appointing them is not otherwise annexed to the mere property of the college than by the obligation to pay certain annual sums, and it is not a trust the execution of which is within the jurisdiction of this Court to enforce, but the observance whereof is provided for by the authority of the visitor, then the breach of duty ought to be redressed by the visitor, and not here. Now the school is not a separate foundation, and the royal licence obtained by the founder to establish the college contained no direct reference to a school, but directed such statutes to be made as might be necessary for the regulation of the college, and the statutes made for the regulation of the college directed, that there should be a schoolmaster and usher, to be hired and removed by the president, and provided for the payment of their stipends out of the funds of the college, and they were to have rooms and commons equally with the fellows of the college, but there was no other endowment of the school. A building was erected for the school, but no property was otherwise appropriated for its maintenance and support: and, subject to the payment of the fixed stipends and particular payments for other specific purposes, the revenues belonged to the college for its own use, and there was no trust to be executed thereof by this Court. The college had, no doubt, an important duty to perform with reference to the school, and the performance of it might be enforced by proper authority; but unless it was a duty founded on a trust, which this Court could execute, the purpose of it could not be here enforced. My opinion is that I have no jurisdiction to interfere in the present case. There is here no evidence of a trust, as that word is understood in this Court. This information must, therefore, be dismissed; but considering what had been done with the school, and the erroneous view the defendants admit they had taken of it, and the colour of right under which the information had been prosecuted, I think I shall not do wrong in dismissing the information without costs.

His Lordship concluded by saying, that he had read with satisfaction the statement of the defendants in their answer as well as of their counsel at the bar, that they intended without the intervention of authority to make the school much more efficient than it had ever been, and thus much good would arise from the filing of the information and the discussion of the matter in court.

L.C.
June 11, 12, 23, 26. } DALE *v.* HAMILTON.

Statute of Frauds—Joint Speculation in buying, improving, and selling Land—Partnership.

In 1843 *the plaintiff and A. entered into a parol contract to become jointly concerned in a speculation for buying, improving, and selling land at B; A. to find the necessary capital, and the plaintiff (a land agent) to select, purchase, lay out, and resell the same, without charge: the advances made by A, with interest thereon, to be the first charge upon the proceeds of the re-sale, and the surplus profits to go, two-thirds to A. and one-third to the plaintiff. Land was selected and purchased by the plaintiff accordingly, and A. afterwards made over a moiety of his interest in the speculation to C. The purchase-money was provided by A. and C, and the conveyance taken in their joint names. On the plaintiff repeatedly pressing, by letters to A. for some written acknowledgment of his interest, A. handed over to him a copy of an agreement, dated*

the 27th of October 1843, *and made between A. and C, to the effect that A. and C. were interested in two-thirds of the surplus profits, and that the remaining one-third was to be reserved for the plaintiff; but that the plaintiff should have no power to determine when any re-sale should take place. In* 1844 *A. died, having devised the property by his will. To a bill by the plaintiff against C. and the devisees of A. for an account, a sale of the land, and application of the proceeds according to the agreement, all the defendants insisted, by answer, on the Statute of Frauds, C. admitting that previously to his joining in the speculation, A. had informed him that the plaintiff was to have one-third of the surplus profits:—Held, that this was a partnership; and that the fact of the partnership being established by general evidence, the land would be dealt with in equity as the stock of the partnership, and that the statute was no bar to the plaintiff's claim. Secondly, that the memorandum of October* 1843, *coupled with the previous assertions in writing of the plaintiff's right, which was never denied by A, was a sufficient manifestation in writing, within the statute, of the pre-existing interest of the plaintiff in the lands. The Court declared the plaintiff entitled to one-third, and referred it to the Master to inquire whether it was expedient that the property should be sold immediately.*

This cause came before the Vice Chancellor Wigram, in November 1846, and a report of it will be found *ante*, p. 126.

Both parties appealed from his Honour's decision, the plaintiff contending that there was not sufficient cause for the issues which the Vice Chancellor directed to be tried, and the defendants insisting that the bill ought to have been dismissed, with costs.

Mr. Romilly and *Mr. R. Palmer* appeared for the plaintiff; and

Mr. Rolt, Mr. Willcock, Mr. Wood, and *Mr. Fleming,* for the defendants.

June 26.—The Lord Chancellor.—This case became embarrassed in the court below, by an attempt on the part of the plaintiff to get what appeared to be more beneficial than what I think he is clearly entitled to, and the obtaining of which was attended with a certain degree of difficulty from the want of an agreement in writing commencement of the plaintiff's con with Mr. M'Adam. The Court c issues to try the fact of partnership; if they were to be tried, might, I leave the parties in further embarra and without the means of comin conclusion as to their respective righ however, need not advert any fur that part of the case; because the below, not giving any declaration in of the plaintiff, but merely direct issue for the purpose of ascertaini right, the plaintiff is not satisfied w decree, and has presented a peti appeal, which came on for hearing t with an appeal on the part of the defe in which it was contended that th no case made, and that the bill of ought to have been dismissed. The tiff, therefore, by appealing, and by stated by his counsel at the bar, willing to take such relief as I m sider him entitled to, founded on t morandum of the 27th of October and I cannot but think that if the c rested on that memorandum in the below, all that embarrassment wh felt in disposing of the case would ha entirely saved, because it appears t be a perfectly obvious and straight case, resting on that memorandum.

The memorandum is a document by M'Adam and Hamilton; and the tiff's case is that he entered into an a ment with M'Adam, the object of was to purchase land at Birkenhea for the purpose of investment or retained as real estate, but for the p of being resold, and then they were to the profits; the plaintiff being, as h entitled to one-third. Letters are from the plaintiff to M'Adam, who dead, no doubt shewing that that v view of the case; but those letters evidence of what they contain, not recognized by the person to whom the addressed, beyond this, that such were written, and such demands and made, on the part of the plaintiff. great difficulty, therefore, arises in blishing the plaintiff's claim on the ters, or on the transaction which too anterior to the date of the memorandum 27th of October 1843, which memor however, came out of the possession

party, and was signed by M'Adam and by Hamilton, M'Adam having entered into an arrangement with Hamilton to divide with him M'Adam's interest in this adventure. The memorandum is as follows:—"Memorandum of Agreement between Robert M'Adam and Robert Hamilton, made the 27th of October 1843, relative to a lot of land in Prices Street, Lord Street, and Camden Street, Birkenhead, say 25,400 square yards, purchased from Thomas Forsyth and his trustees, at 4*s.* 9*d.* per square yard." Then it gives the sum and the calculation, making 6,044*l.* 7*s.* 6*d.* "That the said Robert M'Adam and Robert Hamilton shall advance each one-half of the purchase-money, and that they shall receive interest on the same at the rate of 5*l.* per cent. per annum, which interest is to be made up half-yearly, and calculated the same as bankers' accounts; that the said Robert M'Adam and Robert Hamilton are to have each one-third interest in the said purchase, and that they are to reserve one-third of the profits arising therefrom for T. A. Dale (that is, the plaintiff), in lieu of his commission for purchasing, selling, surveying, valuing, laying out in lots, or any other services that may be required of him; but it is clearly and distinctly understood that the said T. A. Dale shall have no power or authority whatsoever over the said land, and that he shall not be entitled to receive any compensation whatsoever therefrom until the whole is sold and paid for, and all outlay and expenses incurred thereon are deducted therefrom."

Now, without going out of that memorandum—without, on the part of the plaintiff, claiming anything except what is to be found on the terms of the memorandum—this is perfectly clear, that there was a purchase made by M'Adam, afterwards divided between him and Hamilton, and that he and Hamilton were only to have one-third each in the adventure; that the adventure was to sell the land and realize the profits, after paying the expenses and the interest on the purchase-money, and to divide the profits into thirds, one-third for M'Adam, one-third for Hamilton, and one-third for Dale. This we have, under the handwriting of Robert M'Adam and Robert Hamilton; and on the part of the defendants it is asked, in the face of that declaration of trust, that by dismissing the bill I should tell the plaintiff, and tell the defendants too, that they, the defendants, having declared that they are interested in one-third each, are to keep the whole; and they having declared that Dale is entitled to one-third, that he is not to receive anything at the hands of a court of equity, and that, upon a supposed application of the Statute of Frauds. That statute was made to prevent fraud, and therefore has provided that declarations of trust shall always be in writing, not that they should originate in writing, but that they should be evidenced by writing, and there is the greatest distinction between agreements and declarations of trust—the agreement, which is the origin of the interest, need not be in writing; the declaration of trust, which is only the recognition of a pre-existing interest, must be in writing: but it is the evidence and recognition, and not the origin of the transaction, that must be in writing. Here this is recognizing a past transaction, because the purchase had been agreed for before Hamilton became entitled to any share in it; and in this agreement between themselves they recognized Dale's right to have one-third part of the profit to be produced by the sale of the land, after paying the expenses and interest on the purchase-money. There is nothing to be said, and nothing to be argued at the bar, and nothing could be said, to make it even probable that there would be any difficulty in a court giving effect to that declaration of trust. Now, it would be the strangest thing in the world if, the statute being satisfied, which it is by finding this writing signed by the parties, the Court should hesitate to give relief to the party whom it declares entitled to the benefit of the agreement.

The defendants have, by their unfounded resistance to this demand, put the plaintiff into this situation, that he is become excluded from that one-third part: they have admitted that he is entitled to appropriate that one-third part, which they have no right to themselves. It appears to me, therefore, the case is freed from all difficulty on this declaration of trust. It is nothing that the plaintiff is no party to this declaration of trust; it is not required. A declaration of trust may acknowledge a right in a third party, if it is signed by the

party, declaring that he is a trustee for the other party. That memorandum, found in his own possession, is sufficient to evidence a trust within the Statute of Frauds. It is true that Dale was no party to this, but those with whom he was dealing, and who were interested in the dealing when the conveyances were made under their hands, declare that they held in trust as to the one-third. There is no doubt or difficulty whatever found in the plaintiff's case, on this declaration of trust, that he is entitled to the interest which these two parties have under their hands acknowledged that he is entitled to; then all the minor difficulties vanish when this question is put on that declaration of trust in this document of October 1843: and the conduct of the defendants removes the few topics that have been urged against the plaintiff's right, for if they, by their conduct, repudiate the trust, and endeavour to exclude the plaintiff from that which they have themselves under their hands declared him to be entitled to, how are they to argue that he, the plaintiff, has withdrawn, and has not acted under the trust, if they repudiate the trust? If they had called on him to perform his part — if they, acknowledging his title, had called on him to render those services which seem to have been part of the consideration for letting him into a share of the profits of this adventure, nobody can say how that might have operated on the case so presented; but when they declare he has no right, and endeavour to exclude him, and tell him he has nothing to do with the land, there is an end of the case against the plaintiff for not having performed those services which, by their conduct, they have shewn they would have refused to accept if he had offered to discharge them.

Now, then, the question is, under that declaration of trust, and resting the plaintiff's title on that declaration of trust, what the Court ought to do; because it is clear, on this declaration of trust, the parties contemplated a degree of management for the purpose of realizing the best profits they could from this adventure. The land was to be allotted and laid out, and various courses adopted for the purpose of obtaining a better sale for the land so purchased; and the defendants insist that by the terms of the declaration of trust they are to be the sole judges of what that management is to [illegible] and that the plaintiff is to have no voice in [illegible] But the answer to that is, that if the defendants who are trustees, and who have decl[illegible] ed themselves to be trustees *quoad* the plaintiff's third—if they themselves refused perform those trusts—if they, by endeavouring to appropriate it to themselves, and withdraw it from the plaintiff who is [illegible] titled to it, have refused to do that which by this declaration of trust, they were have done, it is like all other cases trustees who have refused to execute [illegible] duty they have undertaken; and this C[illegible] will take on itself, so far as it can, to [illegible] the *cestui que trust* in the situation in which he would have been in if the trusts had been properly performed.

Now it must be considered what the Court can do, unless the parties will have sense enough after what has taken place, to arrange among themselves some plan more for their benefit; and they must do that out of court; I cannot interfere with that. In the mean time, I must assume the plaintiff is compelled to get that which the Court alone can give him—I must make the decree in the terms Mr. Romilly has suggested: I must direct the land to be sold. It may be better for the parties not to sell the land immediately. If so, and they have any sense of their own interest, they will, of course, agree among themselves how to manage it. If not, I can only do what Mr. Romilly suggested, declare the plaintiff's right, under this memorandum; refer it to the Master to inquire whether it is not expedient for the interest of the parties interested in the estate to proceed now to a sale of this land; and if it is to be sold under the direction of the Court, there will be no difficulty then in disposing of the purchase-money produced by the sale. I, therefore, propose to declare that the plaintiff is entitled to one-third part on the terms of the agreement, and refer it to the Master to inquire whether it is expedient that the property should be brought to a sale. The plaintiff must have his costs of the cause, but not the costs of his appeal; and the defendants' appeal is dismissed, with costs.

ROBINSON v. WALL.

d Purchaser—Specific Perform-
rved Bidding.

taken the benefit of the Insol-
s Act, his assignees, with the
his creditors, entered into an
with M. that he should pay
the estate of C, and that the
ould cause the sale to take place
ction, without any reserved bid-
the proposed bidding of 35,000*l.*,
M. should, at such sale, bid the
000l. or any higher sum, and
be no bidding higher than his,
ould be knocked down to him at
of 35,000*l.*, *but M. was not*
ke any higher bidding. Par-
conditions of the sale of the estate
printed and circulated, stating
was to be sold without reserve.
attended the sale, and also W,
F, and many other persons.
was knocked down to F. at
ho, through his agent, paid a
5,000l., and signed the usual
to complete his contract; the
preceding bidding of 49,800*l.*
by M. F, at the time of the
at M. would bid 35,000*l. for*
ut it did not appear that F. was
with the agreement between M.
signees:—Held, under the cir-
that a bill by the assignees of C,
ecific performance of the con-
not be sustained; and the same
d with costs.

iculars of this case, and the
the Master of the Rolls, will
orted, *ante*, p. 17.
tiffs appealed from that decision,
was argued, before the Lord
by—
ell, Mr. Rolt, and *Mr. Chand-*
appellants; and
t, Mr. Roupell, and *Mr. Rogers*,
ndent.
n appeared for the auctioneer.
Clarke, 12 Ves. 477,
v. *Parsons*, 3 Ibid. 625, *n.*
v. *Castle*, 6 Term Rep. 642,
in addition to other authorities

which were referred to before the Master of the Rolls.

July 10.—The LORD CHANCELLOR.—The Master of the Rolls in this case was of opinion that the purchase by auction was void as against the purchaser; that is, that the vendors could not enforce the contract against the purchaser, upon the ground of its not having been conducted upon terms consistent with the contract held out to him by the particulars of sale, the sale advertised professing to be without reserve, and the facts having taken place under the circumstances which I shall presently advert to. Now, that a sale by auction without reserve, where there has been a bidding on the part of the vendor for the purpose of keeping up the price, cannot be enforced against the purchaser, was decided by Sir John Leach, in the case of *Meadows* v. *Tanner* (1). Although that was the only case referred to, and the only one that I am aware of that exists, where the precise and particular circumstance arose and the point was decided; it is, in fact, involved in all the numerous cases which have arisen, in which questions have been raised, whether employing puffers at a sale does or does not make the sale void. They all proceed upon this:—the question is, whether the course pursued by the vendor be or be not in violation of the contract which he enters into with the public in the mode in which he offers the property for sale. Sometimes it has been said one puffer may be allowed, and sometimes that two will make it void, although one will not. A variety of decisions, not reconcileable with each other, has taken place upon these points, all proceeding upon the question whether, in the opinion of the Court, the course pursued has or has not been consistent with the contract held out to the public. In any case, therefore, in which it is clear that the course pursued has not been consistent with the contract held out to the public, all those cases establish the principle, as naturally they must, and it is a principle of equity, that a contract cannot be enforced which has been obtained by a course of proceeding inconsistent with good faith.

The question therefore is—and the only

(1) 5 Mad. 37.

question, for there is no doubt upon the law—whether what took place in this case was or was not a violation of the contract proposed to the public, namely, that the property should be sold without reserve. Now the terms "without reserve," in that case before Sir John Leach, are defined by him to be—what? "Without reserve," he says, means "that no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price." That might be a very good definition so far as related to the particular case to which it was meant to apply; but it does not quite go to the extent to which the terms necessarily refer. When a property is offered for sale without reserve, the meaning, and the only meaning that can be attached to it is, that the bidders, the public who choose to attend the sale, shall have it whoever bids the highest; and "without reserve" means that the biddings shall be among themselves, and that there shall be no biddings on the part of the vendor, because it is to be without reserve. In whatever mode or form you put it, it is not without reserve, it is not left to the bidding of the public without the interference of the parties, if by any means or contrivance, it matters not what, there be means resorted to by which the vendor is to prevent the effect of open competition. I consider, therefore, the terms "without reserve" to exclude any interference on the part of the vendor, or, which is the same thing, those who come in under the vendor, to interfere with the right of the public in the property purchased by the highest bidder, and that without reference to the amount to which that highest bidding shall go.

What took place, although it is rather complicated, appears to me to amount to a reserve, or precisely identical with the same thing, so far as the public is concerned, which is the only way you can look at it. It is quite immaterial what took place between the vendor and any other person; that is only the machinery by which the effect is produced. I look to see what is the effect of what took place as regards the public—as regards those who attended the sale. The result of the arrangement between the vendor and Lord Mostyn was that there should not, in fact, be any sale by auction at all unless the price exceeded 35,000*l.*; therefore it was a of a sale under that price going into the auction-room to bid for this property, whatever of purchasing it un 35,000*l.* Now, whether structed the auctioneer no down to any bidder under buy it in, as it is called, or to a person employed to bid or to a person with whom contracted he should have and that no bidding shoul his contract under 35,000*l* public is concerned it is pre there is no bidding which effect. What is held out being a sale without reserv without reserve: it is a sale that is to say, with that arr prevents the possibility of public purchasing the pro exceeds a certain amount. place beyond that certain ar cured by the circumstance bidding above it. That is co principle of all the cases, b have been produced by th proceeding. It may very if the property had been strictly speaking, without entirely to the public to b thought right, it never m 35,000*l.* If it attains 3 of the arrangement betwe those with whom he is circumstance of a pers cannot bind the party when he came into th began to bid.

It appears to me, the ing the complicated the vendors and Lor for 35,000*l.*, and wit provisions of the d stands, perfectly uni affect the present rangement by whic hibited from the p under 35,000*l.* wa the terms "withou therefore inconsist out to the public. of the Master of t appeal must be d

L.C. July 7. } DUNNING v. HARDS.

Creditors' Suit—Costs—Contribution.

Where the plaintiffs in a creditors' suit claimed to have a particular part of the testator's estate appropriated towards payment of their debt, the expenses attending that claim, being unconnected with the general administration of the estate, were directed to be borne by the plaintiffs; and the other creditors were not required to contribute towards them.

This was a creditors' suit, instituted by Mrs. Dunning and her children against the representatives of James Hards, deceased. Mrs. Dunning was entitled, for her life, under the will of a testator, who died in 1810, to the interest of a legacy of 250*l.*, and also of a share of the residue of the testator's estate, which share was about 200*l.*; and upon Mrs. Dunning's decease, the principal was to be divided among her children. James Hards was the sole acting trustee in respect of these sums; and instead of investing them in the government funds, or on real security, he applied them to his own purposes. He, however, paid the interest regularly to Mrs. Dunning, up to his death in 1837, and he had effected a policy of insurance in his own name, upon the life of Mrs. Dunning, for the sum of 250*l.* The bill prayed for an account of what was due to the plaintiffs from Hards' estate, and also the usual accounts of the estate of Hards, and for the due administration thereof, and for an investment in favour of the plaintiffs of the trust money due to them, and that it might be declared that the plaintiffs were entitled, if it should be for their benefit to do so, to treat the policy of insurance as having been set apart by Hards to secure, so far as the monies receivable under the policy would extend, the said trust fund, and that Hards' estate was bound to keep it up, and that it might be assigned to trustees for the benefit of the plaintiffs. The case was heard, before Vice Chancellor Knight Bruce, in April 1846, when his Honour declared that the policy of insurance effected by Hards was appropriated by him as a security to the children of Mrs. Dunning for the legacy of 250*l.*, but that the estate of Hards was not liable to keep it up after his death. The common accounts were then directed to be taken; and the decree contained the usual direction that before the other creditors of Hards should be allowed to come in and prove their debts they should contribute to the plaintiffs their proportion of the expenses of the suit. The defendant, the executor of Hards, appealed from those parts of the decree by which the policy was declared to have been appropriated for the benefit of the plaintiffs, and by which the other creditors were directed to bear their proportion of the costs of the suit.

Mr. J. Russell and *Mr. Southgate*, for the appellant, contended that there was not sufficient evidence to enable the Court to decide in favour of the plaintiffs' claim to have the policy of assurance appropriated for their own benefit; that this claim was unconnected with the general administration of Hards' estate, and that the costs of this part of the suit ought to be borne by the plaintiffs personally; and that as the plaintiffs were informed that the assets of Hards would not be adequate for the full payment of his debts, the expense of this suit was improperly incurred—*King* v. *Bryant* (1).

Mr. Rolt and *Mr. Craig*, for the plaintiffs, insisted that there had been an appropriation by Hards of the policy for the protection of the plaintiffs; and that there was nothing in this suit which should induce the Court to make any departure from the ordinary form of the decree as to costs; that there was no evidence that the assets of the testator were insufficient; and that if the creditors chose to come in under this suit they ought to bear the proper and usual proportion of the expenses which had been incurred in its prosecution. They cited *Larkins* v. *Paxton* (2).

The Lord Chancellor said, that there was not sufficient evidence to lead the Court to the conclusion that there had been any appropriation by the testator of the policy of assurance, and the decree must be varied on that point. There might be a reference to the Master at the plaintiffs' expense, to inquire into the validity of their claim to the policy, as a security for, or in part

(1) 4 Beav. 460.
(2) 2 Myl. & K. 320.

satisfaction of, the 250*l.* That as to the expenses of that part of the suit which related to this claim, the other creditors had nothing to do with it, and ought not to bear any portion of those costs. After directing the other creditors to contribute to the costs, there must be an addition of the words, "except the costs of so much of the suit as relates to the plaintiffs' claim to the policy of assurance for 250*l.*"

L.C. July 9. } SCAWIN *v.* WATSON.

Legacy — Construction — Restricted or Absolute Gift—Demurrer.

A testator, after giving absolute bequests to three of his children, gave and bequeathed to his daughter H. 1,000*l. out of his* 3½*l. reduced stock, and also* 70*l. a-year during her natural life, to be paid to her by four quarterly payments after H. attained the age of twenty-one years and six months; which two sums he directed and devised to be under the trust of his executors, viz., not to permit H. to assign the said annuities to any one, and the interest arising from the* 1,000*l. as it became due, to be paid to her, for her life, into her own hands, and her receipt to be a sufficient discharge, even if she married, and at her decease the* 1,000*l. to be equally divided between her children. H. was unmarried and a minor at the death of the testator, but married after attaining the age of twenty-one years and six months, and then died having had no issue :—Held, on demurrer, that H. took only a life interest in the* 1,000*l. legacy; and that the same being a restricted gift, her representatives could not take under it.*

The will in this case and the decision of the Master of the Rolls are reported, *ante*, p. 174.

The plaintiff appealed from that decision.

Mr. Tinney and *Mr. Toller*, appeared for the plaintiff; and—

Mr. Purvis and *Mr. F. Bayley*, for the defendants.

The Lord Chancellor said he thought that the rule of construction which was adopted by the Court in cases of this descrip- tion was correctly laid down in *Gomperts* v. *Gompertz* (1). If there was a gift followe by a particular direction for its inves- ment and for the application of the incom- that was intended for the advantage a benefit of the legatee, and was not diminution of the original gift. In th will there was a gift to the daughter duri her natural life. What was the subje matter of the gift ?—1,000*l.* stock and 7 a-year. They both formed part of sentence, and must be regulated as to term of their enjoyment by the limita for life. The testator, moreover, dire these sums to be under the controul of executors: he called them "annuities," he precluded his daughter from assig them. Upon her death, he gave the cipal to her children. He thought was no gift to the daughter of anything the income for her life; and that the sion of the Master of the Rolls was t fore correct, and the appeal must be missed with costs.

L.C. July 26. } DUNSTON *v.* PATERSON.

Mortgage—Re-conveyance—Transfer Mortgage Debt—Costs.

Upon a motion to restrain a morta from selling the mortgaged property, order was made by consent to refer it to Master to take an account of what was to the mortgagee for principal, interest, taxed costs, then properly incurred; reserving the costs of the suit. The mo gagee was found to be entitled to a m smaller sum than was mentioned in the mo gage; and by the order made on furt directions, the mortgagee was ordered transfer the mortgage debt, as well as mortgaged premises, and to pay the costs the suit:—Held, upon appeal, that mortgagor was not entitled to have a trans of the mortgage debt; and that, after course adopted by the parties upon making of the first order, the costs of suit must follow the ordinary practice, be paid by the mortgagor.

(1) 2 Phil. 107; s. c. *ante*, p. 23.

This suit was instituted by an unmarried woman, who had executed a mortgage of certain reversionary interests. The bill stated that a part only of the amount for which the mortgage was expressed to be made had been advanced to her, and prayed for an account of what was due upon the security. A similar suit had been instituted by a sister of the plaintiff, who was also unmarried; and a motion had been made in each of these suits for an injunction to restrain the defendant from selling the reversionary interests comprised in the mortgages. The motion was brought on in May 1846, when an order was made by consent, in both causes, that it should be referred to the Master to take an account of what was due from the plaintiffs respectively, for principal and interest on their respective mortgage securities, and taxed costs, such as were then to be taken to be properly incurred, and the costs of these suits were reserved. In December 1846 this cause came on before Vice Chancellor Knight Bruce, and, by the order which was then made, it was ordered that the plaintiff should pay to the defendant the amount of principal and interest which was reported by the Master to be due, and that the defendant should thereupon transfer, re-convey, and assign to the plaintiff the said mortgage debt and premises, free from incumbrances, occasioned by him, and should deliver up all deeds, &c., and the plaintiff's costs were to be taxed and set off against a sum of money, at which certain costs of the defendant had been already taxed. The defendant appealed from so much of the decree as directed him to transfer the mortgage debt, and also from that part of the decree which related to the costs.

Mr. James Russell and *Mr. Hardy*, for the appellant, insisted that the mortgagee was not bound to execute any re-conveyance until he had received his debt; that there was then no existing debt which was capable of being assigned; and that the costs of a suit to redeem were always borne by the mortgagor.

Mr. K. Parker, *Mr. Malins*, and *Mr. Borton*, for the plaintiff, cited *Medley* v. *Horton* (1), upon the first point, and contended, that the question of costs was expressly reserved for future consideration, when the reference to the Master was directed; and that, under the circumstances of the case, the defendant ought to pay the costs.

The LORD CHANCELLOR (without hearing a reply) said, that no case had been produced in which a mortgagee had been ordered to execute an assignment of the mortgage debt; and there was no express stipulation in the agreement between these parties that the mortgage debt should be assigned upon payment of the money due. He thought, therefore, that this direction in the order of the Vice Chancellor was erroneous. With regard to the costs of the suit his Lordship had not before him the means of deciding on the character of the transactions which had taken place between the parties, and he thought that they must follow the usual course, and be paid by the mortgagor. The course which the parties had adopted, and the nature of the order which had been made by consent, seemed to him to prevent the question of costs being now raised.

(1) 14 Sim. 226; s. c. 13 Law J. Rep. (N.S.) Chanc. 442.

L.C. June 9. { MATTHIE *v.* EDWARDS. JONES *v.* MATTHIE.

Mortgage—Reversionary Interest—Power of Sale, Oppressive Exercise of.

A few weeks after the death of a mortgagor and before probate of his will had been obtained, the mortgagee proceeded to exercise a power of sale of a reversionary interest. Several communications were taking place at the time between the solicitors of the mortgagee and the solicitors who acted on behalf of the family of the mortgagor, and who protested against the sale as unnecessary and oppressive, and offered to pay all the principal money, interest, and costs as soon as an assignment could be prepared. It was not shewn that there was any fraud in the transaction, or that the reversionary interest was sold at an undervalue. A bill, filed by the executrix of the mortgagor, to set aside the sale, was dismissed, with costs, reversing the decision of the Court below.

By an indenture executed in December 1837, in contemplation of the marriage of Mr. and Mrs. Matthie, a sum of 3,000*l.*, which had been advanced upon mortgage of a freehold estate, and a sum of 1,000*l.*, which was secured by a bond, were assigned to trustees, upon trust for Mr. and Mrs. Matthie, successively for life, and after the death of the survivor upon trust for the children of the marriage, and in default of children for Mr. Matthie absolutely.

Between November 1842 and July 1843, Mr. Matthie obtained four advances, amounting together to 670*l.*, on the security of his interest in these sums of 3,000*l.* and 1,000*l.* The last mortgage security was dated the 6th of July 1843; and, after reciting the settlement and the three prior mortgages, it contained an assignment by Mr. Matthie of his interest in the trust funds to Mr. Thomas Wilkinson, as a security for 120*l.*; and in default of payment of that sum on the 1st of September 1843, the mortgagee had a power of sale by public auction or private contract.

In all these transactions Mr. Matthie employed Messrs. Harper & Jones as his solicitors, and Mr. Harper was in possession of his will and of numerous papers belonging to him: at the time of his death Harper was also one of the trustees of the settlement, having been appointed upon the death of one of the original trustees.

In December 1843 Mr. Matthie died, and there was no issue of the marriage. In January 1844 his wife proved his will, and became his sole legal personal representative. In the interval between the death of Mr. Matthie and the obtaining probate of his will, several letters passed between Messrs. Harper & Jones and the solicitors who were acting on behalf of Mrs. Matthie, and some other members of her family, and Messrs. Harper & Co. pressed for payment of the sum due to them from the deceased.

At the beginning of January 1844 Mr. Wilkinson, the fourth mortgagee, caused an advertisement to be inserted in the newspapers, stating that Mr. Matthie's reversionary interest in the trust fund would be put up for sale by public auction, at Chester, on the 27th of January 1844. It was described as a reversion expectant on the decease of a widow lady, then aged thirty years or thereabout, in a pri sum of 4,000*l.* Messrs. Harper & acted as Wilkinson's solicitors in the action. No intimation that such a would be taken had been given to Matthie or her solicitors.

On the 12th of January Mrs. Ma solicitors wrote to Harper & Jones, t taking, on behalf of their client, that sale were postponed, they would pa whole principal, interest, and costs d the mortgage securities as soon as a j assignment could be prepared and exe Messrs. Harper & Jones declared selves willing to stop the sale, but lated for the payment of what was d themselves also from Mr. Matthie.

On the 27th of January 1844 a attended the sale on behalf of Mrs. M and made several biddings: the h bidding was 1,020*l.*, and the propert then bought in for 1,500*l.* On the 1 February the first mortgagee was paid the plaintiff, and tenders of their resp debts were made to each of the other gagees, who were all clients of Messrs. H & Jones, but they all refused to acce money. On the 9th of February 18 property was sold by private contra 1,050*l.* to Mr. Eyton, who was one defendants, and who was also a broth law of Mr. Jones. The bill alleged had, in fact, been sold for the bene Messrs. Harper & Jones, which was by the answer, and held by the Cou to be proved. A sum of 125*l.* had paid as a deposit, which payment was by Eyton being debited with that a in account with Harper, who was i receipt of various monies for the ben Eyton.

This bill was filed against the mortgagees who had not been paid against Eyton, and Harper & Jones: prayed that the plaintiff might be at li to redeem the mortgaged premises, an the sale might be declared fraudulen void as against the plaintiff.

In the evidence on the part of the tiff, the value of the reversionary in was estimated by one witness at 1,036 by another at 1,320*l.*

The cause was heard before Vice cellor Knight Bruce, in March 1846, his Honour decided that the sale mu

set aside. He dismissed the bill, without costs, against Harper & Jones, and directed Wilkinson to pay the plaintiff's costs up to the decree, reserving the question whether Eyton should pay costs.

Eyton appealed from that decision, but died before the appeal was heard. Mr. Jones was his personal representative, and filed a bill of revivor.

Mr. Stuart and *Mr. Anderdon*, for the appellant, contended that the mortgagee, Mr. Wilkinson, had not exercised his power of sale in an improper manner; that on the death of Mr. Matthie, the income of the trust fund became payable to his widow for her life, and Mr. Wilkinson had, therefore, no security for the payment of his interest; that the estate of the mortgagor was incumbered, and there was no legal representative with whom the mortgagee could negotiate.

Mr. Bacon and *Mr. Renshaw*, for the plaintiff (the respondent), contended that the power of sale had been oppressively made use of. By the mortgage deed, which was executed in July, the money was to be repaid by the 1st of September, and if default was made, the mortgagee had an absolute power of sale. These provisions were of a harsh nature, and the Court would not allow them to be made use of unnecessarily and unfairly. The parties who were acting for the plaintiff promised to pay the mortgage debts as soon as the necessary deeds could be prepared, and the sale was altogether unnecessary; it took place before the probability of there being any posthumous issue of the marriage had been inquired into; and was, therefore, made subject to that contingency. The price obtained was also less than the estimated value, and the sale was evidently made to annoy the family, and not for the benefit or protection of the parties who conducted it.

The following cases were referred to:—

Anon. 6 Mad. 10.
The Earl of Aldborough v. *Trye*, 7 Cl. & Fin. 436.
Waters v. *Groom*, 11 Cl. & Fin. 684 and 699.

The Lord Chancellor.—In this case, Mr. Wilkinson's mortgage contains a power of sale. The mortgage is upon the interest of the husband in a fund of which he was tenant for life; if there were children they took an interest, and if there were no children it became the property of the wife. There being no children at that time, the husband borrows money on the security of his interest in that fund, and by that security, given to Mr. Wilkinson, he has a power of sale, either at public auction or by private contract. Now those powers so given may, undoubtedly, be often used for purposes of oppression. They are, however, powers which the party having a power over the property thinks proper to confer on the individual from whom he borrows the money; it is a bargain: one party parts with his money, and he has to pay himself out of the property upon which it is charged; and it is for the other party, who creates the mortgage, to consider whether he has not given too large a power to the individual with whom he is dealing. But when once it is given, the party advancing his money is perfectly entitled to execute the power which such a contract gives him. It is, however, like other cases, in which, if the power is sought to be exercised for exorbitant purposes, without a due regard to the interest of the parties concerned, this Court will interfere under certain circumstances; and, like other pledges, if the individual comes and deposits the money, the Court will, under certain circumstances, prevent a party from exercising that power arbitrarily, but not without the actual deposit of the sum which the other party is entitled to.

Now, it is quite clear, that the interests of society require, and the justice of such a case requires that those powers, when they do not come within the principle on which the Court has acted, should not be interfered with; it is merely a power which the individual himself has given.

In this case the mortgagor died, and died without children; there was no personal representative for a considerable time; the probate was not obtained till the 23rd of January 1844, and although letters passed between the solicitors acting for the family, there was no legal person with whom the incumbrancer could deal till the probate was actually granted. Under these circumstances, the incumbrancer, Mr. Wilkinson, on the 8th of January (there being then

no personal representative), advertises this property for sale. Letters pass after that advertisement, not from the personal representative, for there was none, but from the solicitors acting for the family, containing some proposals in order to prevent a sale and enable the family to redeem the mortgage. I am not prepared to say that more lenity might not have been shewn on the part of those who acted for Mr. Wilkinson. It might have been better, having a security in his hands sufficient to pay what was due to him, if he had lent himself a little more to the wish of the family. The correspondence does not shew any disposition to depart from the strict exercise of his legal right, but he had an undoubted right to exercise his legal right, such as it was; and this Court has acquired no jurisdiction over that legal right, merely because it is shewn that it might have been executed with a little more lenity.

I see nothing in this case from the beginning to the end, to raise the question whether he has by any means forfeited the legal right. He did no more than exercise a legal right when he advertised it: it has been put up for sale; there were biddings, and the plaintiff, who at that time had obtained probate of the will, on the 23rd of January (the sale not having taken place till the 27th) attended the sale by an agent for the purpose, as it is alleged, of preventing it from going at an undervalue. The way, and the only way, in which she could have prevented it going at an undervalue, was by bidding to its full value. Whether it was her bidding or not, I find the highest bidding at the sale was 1,020*l.* Whether that was her bidding or not, I do not know; if it was, that was the extreme to which she was disposed to go: and if it was not, she, by not bidding more, thought that was a sum it would not be safe to exceed. It, therefore, is a very safe criterion to go by, very much more so than is generally afforded by a sale, when you are uncertain whether they are real buyers or not; because here is a party actually attending for the purpose of preventing the property going at an undervalue, and she is not willing to bid more than 1,020*l.* Then you have the opinion as to the value from the persons who, from their occupation, are calculated to form a correct valuation of the property. They state the property to be 4,000*l.*, subj to a life estate of a person aged thirty yea One of those persons values it at 1,30(the other person values it at 1,036*l.* Nc taking the 1,020*l.*, the bidding at the sa as the means by which to ascertain the valu the total of these three sums would be 3,35(the third of which would be 1,119*l.*, value of the property, subject only to a l estate of thirty years, from which we ded the possibility of a child being born so entirely to take away the property fr the purchaser. That circumstance was stated in the opinion that was taken, a therefore, of course, they put a higher va on the property than they are likely to ha done or could have done if they had kn there was this contingency. Putting tl three sums together, I find the thir 1,119*l.*, against which we have to de this possible chance. What the valu that is I cannot form a guess; but tl is only 69*l.* to meet that contingency. think it is impossible to say that the par could have a better test of the value, a this is the evidence of the plaintiff. T defendants did not go into evidence of value at the hearing; and taking the pla tiff's own evidence and her own acts, fr the mode in which she conducted her at the sale, I find the value would amou to the sum given, with an excess only 69*l.* to meet the contingency of issue.

It is impossible, under these circu stances, that this case could be consider on the ground of undervalue. Whatever t rule may be with regard to reversions interests, I do not inquire into, but I can find in the plaintiff's evidence any case undervalue.

The plaintiff, however, says, by the b that all this is a conspiracy; that it is a n nœuvre practised by the solicitors, for the p pose of benefiting the defendants; or oth wise that they did it for their advanta so as to injure the plaintiff's family. Th is no evidence, I think, to support eit one or the other of those allegations; that were so, it would go a great way prove a scheme for the benefit of the def dants; but that part of the bill the V Chancellor entirely dismissed. It alleged, and not being proved, he has made it the foundation of his decree: t is dismissed. The Vice Chancellor Kni

Bruce is of opinion that this case has failed; and obviously it has, and there was no attempt on this rehearing to establish that case.

The only fact I have is of Mr. Harper, who acted as the solicitor for the mortgagees who have sold, being connected as guardian with the appellant here, who was the purchaser, and as having been his solicitor. Now, as often happens, the solicitors who act for vendor and purchaser, for the plaintiff and defendant, put themselves in a situation of embarrassment, which very often makes it necessary for them to shew they are acting fairly under circumstances which make it very difficult for them to do so. It is, no doubt, in all cases, matter which requires searching investigation, when you find an individual taking on himself those two duties: for acting as solicitor for the mortgagees, the owners of the estate, he is bound to get the best possible price; and acting for the purchaser, he is naturally desirous of obtaining the property at as low a price as could reasonably be expected. But when I find his estimate of the value to be that which was proved by the plaintiff's own evidence to be the full value or nearly the value, why that circumstance which excites attention, and perhaps suspicion, in the first instance, may be disregarded; because I find that there could be no manœuvre practised, for that could only be carried into effect by giving less than the real value. I think the evidence afforded of the value of the property, not only is very important, this being the sale of a reversionary interest, but most important in negativing any improper motive on the part of the parties.

Then, the circumstance referred to, and the only circumstance referred to on the ground on which it is sought to set aside this transaction was, that it was an improvident transaction, and might have been conducted more beneficially to those who were interested in the proceeds of the sale: and the only facts relied on are, that the age had been stated as thirty years, and the fact of its being sold when there was a possibility of the wife surviving and being pregnant; and therefore that those were considerations likely to damp the bidding at the sale for property under those circumstances. I do not know what you can do with regard to the age: "thirty or thereabouts" would not be correct, if the person were thirty-one or twenty-nine; but it is meant to cover some intermediate space; you cannot calculate it to a day. If you specify that she is actually thirty, and she is a week over or under, that would not do; and I think it is quite correct enough for the purpose of calculation, and that can make very little difference in the case. I consider that description quite sufficient to enable a bidder to calculate what is likely to be the value of that reversion. With regard to the possibility of the wife being pregnant, that is incident to the nature of the property itself. The settlement gave the property to the child, if there was a child. There was the possibility, no doubt, of the wife being pregnant at the time of the death of the husband, though there was no child born during the marriage. The chance was greater of there being children while the husband lived, when the party had the power of selling; but the husband being dead, that chance was greatly reduced. There is no doubt, however, that the sale might have been more beneficial if it had taken place at a time when there was less chance of the wife being pregnant. If he was not to abstain from selling during the life of the husband, why was he to be prevented selling after his death, and wait nine months to see the fact of whether there was issue or not? It is clear, it was within his right and his power. I cannot say, sitting here in a court of equity, that it is one of the principles of the Court that a party having a right to sell, dependent on there being no issue of the marriage, is bound after the death of the husband to wait nine months.

If I confirm this decree, I should be establishing a new rule in the court of equity; and really, on that part of the case, the Vice Chancellor has dismissed the bill, and has therefore negatived the ground of fraud. I find nothing but the circumstance of this gentleman being the solicitor of both vendor and vendee; and it being explained and established to my satisfaction, that that has not led him to do anything improper or injurious to those whose property he was dealing with, I shall not consider it any ground for supporting this decree; and I, therefore, as far as the ap-

pellant is concerned, of course, must dismiss the bill, with costs.

L.C. July 26. } KNILL *v.* CHADWICK.

Parties—Demurrer—Multifariousness—Bill for Account.

A bill stated numerous transactions between the plaintiff and C; and that the plaintiff had given him a bill of exchange for 1,500*l. without consideration, which he had indorsed to N, who held it merely as a trustee, and had recently commenced an action upon it. The bill prayed for an injunction and for an account. A demurrer by N. for want of equity and for multifariousness, was overruled.*

This bill was filed against the first-named defendant Chadwick and Mr. Nicholson. It stated certain dealings and transactions which had taken place between the plaintiff and Chadwick, and then alleged that Chadwick from time to time procured the plaintiff to accept various bills of exchange drawn upon him by Chadwick, without any consideration being paid by Chadwick to the plaintiff; and also to write his acceptance on various blank pieces of paper stamped with bill stamps, which blank acceptances were afterwards filled up by Chadwick as bills of exchange for various sums of money, and had been indorsed and paid away by Chadwick; that on the 2nd of September 1846 the plaintiff accepted a bill of exchange for 1,500*l.* drawn by and payable to the order of Chadwick; that Chadwick never gave or paid to the plaintiff any consideration whatever for accepting the said several bills of exchange or blank acceptances, and that at the time when the plaintiff accepted the said bills of exchange and blank acceptances respectively, the defendant Chadwick was indebted to the plaintiff on the account current between them; that Chadwick had indorsed and delivered the bill of exchange for 1,500*l.* to the other defendant Nicholson, and that Nicholson had recently commenced an action upon it against the plaintiff; that the said bill was indorsed by Chadwick to Nicholson after the same became due, and that Nicholson gave Chadwick no consideration for the indorsement, and Nicholson, at the time when the bill of exchange was indorsed and delivered to him, knew that Chadwick had given the plaintiff no consideration for the acceptance thereof, and that Chadwick was indebted to the plaintiff on the balance of account between them; that Nicholson had no beneficial interest in the said bill of exchange, and was a trustee thereof for Chadwick, and that Chadwick would be entitled to all the monies which Nicholson might recover against the plaintiff in the action.

The bill prayed for an account of all dealings and transactions between the plaintiff and Chadwick, and of all sums of money received and paid by Chadwick on account of the plaintiff, the plaintiff thereby offering to pay to Chadwick what, if anything, should be found due to him on taking such account; that the bill of exchange for 1,500*l.* might be delivered up to be cancelled, and for an injunction to restrain the prosecution of the action at law.

To this bill Nicholson put in a demurrer for want of equity and for multifariousness, which was allowed upon the latter ground by the Vice Chancellor of England, on the 21st of June 1847.

The plaintiff appealed from the decision.

Mr. Rolt and *Mr. Prior*, in support of the bill.—The bill states a long series of transactions, and shews that the plaintiff is clearly entitled to an account as against Chadwick. In the course of these transactions the plaintiff gives the bill, which Nicholson holds. No settlement can be arrived at, unless that bill is included in the accounts, and Nicholson holds it without having given any consideration for it and merely as a trustee for Chadwick.

Mr. Bacon and *Mr. Wickens*, for the demurrer.—Mr. Nicholson is quite unconnected with any other transactions between the plaintiff and Chadwick, and is therefore unwilling to be involved in complicated accounts which cannot affect him. The bill for 1,500*l.* was a distinct transaction. If no consideration was given for it, there is a good defence to the action at law, and the plaintiff has no need to come into a court of equity.

The Lord Chancellor.—This is certainly a case for appeal, and if the Vice Chancellor had heard it fully argued, instead of merely reading the bill, no doubt he would have come to the same conclusion with me. There are two grounds for demurrer: first, want of equity; second, multifariousness. As to want of equity, the bill states a variety of transactions between the plaintiff and the principal defendant Chadwick. The result is a very long and complicated account, which the bill states consists of very numerous items on both sides, and which cannot be taken by a court of law. That will be alone sufficient on demurrer. All ground for saying that the case as between the parties ought to be tried at law is removed by this statement. As to the particular bill for 1,500*l.*, the bill alleges that various bills were accepted and indorsed by the plaintiff and delivered to Chadwick, for which the plaintiff got no consideration; that one of these bills was for 1,500*l.* and was indorsed to Nicholson. If that allegation be true, and it must be taken to be so for the purpose of the demurrer, the allegation is that the bill came into Nicholson's hands to obtain payment against the plaintiff, and no consideration passed between him and Chadwick, and that the money recovered on the bill would come to Chadwick; therefore the equity is the same, whether the bill is in the hands of Nicholson or Chadwick. Now, it can hardly be stated, that Nicholson could sustain a demurrer on this bill. As to the question of multifariousness, if the case be entirely against one defendant, and another defendant is interested only in part of it, he cannot demur for multifariousness, although he has nothing to do with the other part, because if it can be maintained against one defendant, the other defendant cannot demur to it. The only way, therefore, in which justice can be done is not to allow an objection for multifariousness at all. There is a case against Chadwick on account, and therefore that is one entire thing, and Nicholson is connected only with one part, because he is a trustee for Chadwick of one of his securities. I think the demurrer must be overruled.

V.C. April 22. L.C. July 23, 24, 28. } BOUVERIE *v.* BOUVERIE.

Will—Construction—Period of Vesting.

A testatrix gave an annuity of 300l. to her daughter, together with the interest of all she had in the stocks; and at her death she gave the stock to her children, to be equally divided between them, together with the interest to be laid out for their use, in case their mother died before they arrived at the age of twenty-one. In case one died, the others were to have share and share alike; the survivor to have the whole; and if they all died before twenty-one, then she gave the stock to her five nieces. All the children of the daughter attained twenty-one, but four died before their mother:—Held, (reversing the decision of the Court below,) that all the children of the daughter, who attained twenty-one, took vested interests, although they died in the lifetime of their mother.

The testatrix, Katherine Castle, by her will, dated the 19th of February 1793, gave to her sister Dorothy Frome an annuity of 300*l.* a-year to be paid quarterly out of the interest of monies in the 3*l.* per cents., and then continued in these words:—"After her death I give to my daughter Katherine Bouverie the 300*l.* a year, together with the interest of all I have in the stocks for her sole use. At her death I give the stock to her children to be equally divided between them, together with the interest to be laid out for their use, in case their mother dies before they arrive at the age of twenty-one; in case one dies the others are to have share and share alike. The survivor to have the whole. Should they all die before the age of twenty-one, I then give the said stock to my five nieces and my nephew John Thomas, to be equally divided between them." Katherine Bouverie had eight children, all of whom attained the age of twenty-one years, and four died in the lifetime of their mother. The suit was instituted for the administration of the testatrix's estate; and the question now argued was, whether the representatives of the children, who died before their mother, were entitled to a share of the fund given by the will.

Mr. Rolt, *Mr. Craig*, *Mr. J. Parker*, *Mr. Cairns* and *Mr. Schomberg* appeared for the representatives of those children who attained twenty-one, but died in the lifetime of the mother, and contended, that, upon the construction of this will, there was a gift to the mother for life, with remainder to all her children; the effect of that would be, if it stood alone, that all the children would have vested interests, and those vested interests could not be taken away from them except by the subsequent words, and those subsequent words would only have that effect in favour of such of the children, if any, as should attain twenty-one; there were no words whatever to take away the interest in favour of those who should survive the mother. The gift was to all the children,—to be divided between them, making them tenants in common, and the subsequent reference to survivorship could not mean survivorship generally, but must refer to the death of the mother under particular circumstances; then the question would be, under what circumstances? The only two circumstances which could be meant were in case one died before the age of twenty-one, or in case one died before the mother. It was clear on the construction of this will, that the words "in case one dies" meant, in case the circumstances of the death were under twenty-one, and not in case the circumstances of the death were before the mother; or in other words the only contingent death the testatrix had in her mind was death before twenty-one. The following cases were cited in support of this argument:—

Haws v. *Haws*, 3 Atk. 524.
Lord Bindon v. *the Earl of Suffolk*, 1 P. Wms. 96.
Mendes v. *Mendes*, 3 Atk. 619.

Mr. White appeared for the trustee.

The Vice Chancellor.—It rather seems to me that that is not so upon the mere construction of the words. First of all, there is a gift of an annuity to the sister Dorothy; then the testatrix says, "after her death I give to my daughter Katherine Bouverie the 300*l.* a year, together with the interest of all I have in the stocks, for her sole use: at her death I give the stock to her children to be equally divided between them." Nov that that, *primâ facie*, is a gift children. This sentence only r interest, and not the capital; but time it is a sentence which in hypothesis that the children wou the mother. "Together with int laid out for their use," that is, to the children, "in case their m before they arrive at the age of t years;" that is, in other words, I mother for life, with remainder t dren, and if the children surviv are infants, then the interest of shall be laid out for their use; s sentence merely provides for the i assumes in itself the hypothesi children will survive, at any rat them. Then she goes back agai to treat of the capital; and sh expression "in case one dies, the to have share and share alike." term, "in case one dies," must be not with reference to that event, certainly to happen, namely, tha of the children would die; but think, be construed as a phrase gency, referring to the time whe dren should take, that is, as I ap case one dies in the lifetime of t But there is nothing else antecede will, which can tend to make the "in case," point to a contingenc "in case one dies, the others a share and share alike; the s have the whole." There is an e claration that the survivor shall whole, and there is nothing wha appears to me, to shew, that in s the capital she was speaking of t stance of the children attaining t at all. It is perfectly true that "should they all die before t twenty-one," then she gives it those persons who were to take in only took upon that particular s that they should all die under t whether they died in the lifeti mother or survived the mothe rather seems to me the true const that those only were to take wh vive the mother.

The representatives of the dec dren appealed from this decision.

y 28.—The LORD CHANCELLOR.— are two questions involved in the r before me upon the construction of ill, both of which, however, depend ry much the same principle. The first : rule, as applicable to what class of is are to take, and the other relates rule adopted in construing provisions vivorship and gifts over. In both the adopts the rule of leaning, as far as onstruction of the words will justify, ls including as many of the objects gift as possible, consistently with the ed objects of the testator. With regard first, the rule, as laid down by Sir m Grant, in *Howgrave* v. *Cartier* (1), , "If the settlor clearly and unequi- y makes the benefit of the child de- upon its surviving both or either of rents, a court of equity has no autho- o controul the disposition. If the nent is incorrectly or ambiguously ssed, if it contain conflicting and con- tory clauses, so as to leave in a degree tain the period at which or the contin- upon which the shares are to vest, ourt leans strongly towards the con- ion which gives a vested interest to the when that child stands in need of a ion, usually as to sons at the age of y-one, and as to daughters at that age, rriage." Now looking at this will, and r that which is only one among very cases in which the same principle is lown, I cannot entertain any serious as to that part of this question which ds on the first part of the will in which operty is given.

w, the terms are, after giving an an- for life to one person, "I likewise give : said Dorothy Frome an annuity of a-year, to be paid quarterly. This ty I would have paid out of the interest nies that are in the 3*l.* per cents." is an annuity of 300*l.* a-year. Then the tenancy for life: "After her I give to my daughter, Katherine erie, the 300*l.* a-year, together with nterest of all I have in the stocks, er sole use." Here is an estate for the whole property. The annuity rily comes out of the property, and remaining interest arising from the stock. "At her death, I give the stock to her children, to be equally divided between them." Stopping there, the Vice Chancellor has expressed an opinion in which I concur, and as to which no doubt can be entertained, that that is a vested interest in the children. It is for the mother for life, and at her death, which I must construe after her death, to the children. It would include all children born at the death of the testatrix, and all those who might come into *esse*, until the period of distribution, that is, at the death of the mother. The opinion of the Vice Chancellor turned upon the words which follow, because he states, that without the words to which I am now about to advert, he is of opinion that it gave a vested interest in all the children; but the will goes on, after saying that it is to be equally divided between them, "together with the interest to be laid out for their use, in case their mother dies before they arrive at the age of twenty-one." The Vice Chancellor seems to have been of opinion, that that so interfered with the ordinary construction, that it gave such a different meaning to the prior gift, as to confine it to children who should survive at the death of the mother. It does not appear to me that those words can have any such effect. It appears to me that those words are introduced simply for the purpose of giving a direction in the event of there being children under twenty-one, and therefore not of an age to take their share on the mother's death; whether it meant all the children who might have been born during the tenancy for life, or whether the survivors only is equally the same thing: the object was to direct, that if the children who are to take should not be in a situation to take from minority, then that the interest should be laid out, and taken care of for their benefit: but whether that related to the children living at the death, or children that could not be living at the death, if they were born during the mother's lifetime, it can only be applied to those who might be legatees to take, and who should be under twenty-one, when their legacy vested. He considered it, therefore, merely as providing for the contingency of there being children in a state of infancy when the mother died, and not to interfere with the generality of the gift to the objects to take under the bounty of the testatrix. If that is the right

(1) 3 Ves. & B. 85.

construction, and it is a construction about which I cannot entertain a doubt, the only question is, as to the gift over, and that depends on these words, "In case one dies, the others are to have share and share alike; the survivor to have the whole. Should they all die before the age of twenty-one, I then give the said stock to other persons." That was the principal ground of the argument here, but that was not the ground of the judgment of the Vice Chancellor; he relied upon the legacies never having vested in those who die before the mother; but the argument here turned principally upon the clause of survivorship. I am of opinion, however, that though this is an imperfect sentence, and though not expressed according to grammatical accuracy, the meaning of it is quite sufficiently obvious; it is impossible to read it either way without putting either a forced construction upon the words or introducing words, because the words "if one dies," mean, if one ever shall die; but the rule of law is, that if you cannot attach that meaning, you must attach some other meaning. But the expression used is, in case one dies the others to have it, without limiting the time at which the death is to take place: we are therefore dealing with a sentence imperfect, in which one construction or the other, whichever is adopted, cannot be made to correspond with the accurate meaning of the words used. We are compelled therefore to go into other parts of the gift, in order to construe the meaning of the words "if one dies:" it being a rule of this court in putting a construction upon instruments of this sort, that it cannot be an indefinite period of dying, but that it is a contingency depending on some time or other at which that death is to take place. Now, what is the testatrix speaking of? She has immediately before spoken of the children arriving at the age of twenty-one: the very last words of the sentence, "in case their mother dies before they arrive at the age of twenty-one;" that is not introduced with reference to the survivorship, but the period of life they might attain at the time of the mother's death. But at the time the will was written the last idea that was in the testatrix's mind was the children arriving at twenty-one, being the last words which she has used. It is not upon that, although that aids the probability of the construction which I have put words; it is a circumstance to that time that was the idea whic been in the testatrix's mind.

Now, the sentence is, "In c the others are to have share anc the survivor to have the whole. all die before the age of twenty give the said stock" to other not the meaning of that, if a twenty-one, I give it over to ot but if only some or one of ther a survivor at twenty-one, then the survivor? If it is not the the probable meaning of the t a construction leaning to that the Court has in view, of prov largest number of children, an prive a child who, on attaining may have a family to provide vided for under the gift. Now event in which she gives it ov why does she give it over to cause there are none who are tl objects of her bounty surviv any die under twenty-one, ther to the survivors. I conceive it on the frame of this sentence, when she speaks of dying, she under that age the attainment meant to be the period at whicl of the children should becom indefeasible. Now, there are which must have occurred in construction has been put. Her period of twenty-one, and it i served, that if according to the contended for in support of the cellor's decision, there be bu or one surviving child, which twenty-one, and dies leaving there would have been an intes adopt the construction contend would in that event be an in that at all events there woul probability of there being child twenty-one; and who are, th situation to require their portion be entirely deprived of them, i the property might go over t might survive—an intention wh never imputes, and a construct never adopts, if there be suffici ambiguity on the will to justify that construction which would

:ts of the bounty the enjoyment of
:rty at that period of life in which
y they would want the use of it.
ı much less strong case than the
Lord Salisbury v. Lambe (2), be-
:re there was a gift to the children
ıurvivor of them—no age mention-
in the gift over, there was a provi-
ıse all died under twenty-one; and
there was nothing to enable the
say that the expression used in
ıate gift over was also to apply to
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nley says, that it became vested in
ren who attained twenty-one, but
ıe lifetime of the mother; and says,
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} INNES v. MITCHELL.

*ty—Gift of Corpus—Deficient As-
ıatement.*

*ıtor bequeathed an annuity to three
nd the survivors and survivor for
s, and the life of the survivor, with
the survivor of the corpus of the
ım the interest whereof the annuity
ıble. The fund set apart to answer
ity was improperly sold out by the
trustee after the death of one of
itants, and in consequence thereof
the annuity fell into arrear; but a fund, less
in amount than the original fund, afterwards
became available:—Held, that the survivor
was entitled to a rateable proportion of this
fund, in respect not only of the arrears of
the annuity which became due during the
joint lives of herself and her sister, but also
of the arrears of the annuity which became
due after her sister's death up to the time of
her own decease, as well as of the corpus to
which she became entitled as the survivor.*

(2) Ambl. 385.

William Innes, by his will, dated the 12th of December 1789, after bequeathing an annuity to his wife, and several legacies, gave to his three natural daughters a yearly sum of 300*l.* amongst them, and to the longest liver, and he continued as follows:—"I direct and order that a sum sufficient shall be invested in the public funds, in the names of two of my executors, or in the names of two other gentlemen to be appointed by them as trustees, for the three sisters, who are to divide the 300*l.* equally to them while all of them are alive, and to the longest liver of them, and to the longest liver the whole." By a codicil to his will the testator gave the 300*l.* per annum to "Mrs. Ann Mitchell, Sophia and Harriet Palmer, who are my natural children, to be equally divided amongst them during their lives, and to the longest liver of them, when the stock which produces that yearly sum may then be sold for the use of such longest liver and her heirs." And he appointed William Palmer and his said three sisters his residuary legatees.

The testator died on the 14th of January 1795. A sum of 10,000*l.* stock was set apart by the executors to answer the annuity, which was regularly paid to the three daughters until the year 1800, when Sophia (who had previously married the Rev. G. C. L. Young) died. After her death the annuity was regularly paid to the two surviving annuitants until the year 1816, when George Hanbury Mitchell, the surviving executor, died. He had sold the stock which had been invested to secure the annuity, and there being no other funds wherewith to satisfy the same, it ceased to be paid, and wholly fell into arrear. Harriet married Colonel Alexander Stewart, and died on the 27th of July 1837, at which time there was due to her, in respect of her moiety

of the annuity, accrued due since 1816, the sum of 3,150*l.* Mrs. Mitchell died on the 18th of March 1845, at which time there was due to her, in respect of the annuity, 5,000*l.* and upwards.

In the month of July 1845, a sum of 7,380*l.* 1*s.* 6*d.*, which had been invested to secure an annuity to one Janet Innes, fell into the testator's residuary estate. This sum was now claimed by the parties representing Mrs. Stewart and Mrs. Mitchell, and the question was in what proportion it was to be divided. The share of Mrs. Stewart was claimed by her husband Colonel Stewart, and the share of Mrs. Mitchell by certain nephews and nieces, to whom she had, by her will, specifically bequeathed her interest in the annuity.

In the month of January 1846 a petition was presented by Col. Stewart, stating the above facts, and praying that the sum of 7,380*l.* 1*s.* 6*d.* might be sold, and, after payment of the costs, that he might be paid in full the sum of 3,150*l.*, and that the residue might be paid to the parties claiming under Mrs. Mitchell; and the Vice Chancellor made an order in accordance with the prayer of the petition.

The legatees of Mr. Mitchell appealed from that decision.

The question was whether the 7,380*l.* was to be apportioned in such a manner that Mrs. Mitchell's representative would receive anything on account of the arrears of the annuity between the time of Mrs. Stewart's death (when Mrs. Mitchell acquired the whole interest in the fund), and Mrs. Mitchell's death, or whether it was to be apportioned between the arrears up to Mrs. Stewart's death and the gift of the corpus to the survivor of the three sisters, which would reduce the claim of Mrs. Mitchell's representative to the extent of the amount of the annuity for the time during which she survived Mrs. Stewart.

Mr. James Parker, Mr. Stuart, Mr. Bethell, Mr. Cooper, Mr. Miller, Mr. Follett, and *Mr. Evans,* appeared for different parties.

The following cases were cited:—

Bowker v. *Bowker*, Seton on Decrees, 70.
Ex parte Chadwin, 3 Swanst. 380.
Franks v. *Cooper*, 4 Ves. 763.
Hume v. *Edwards*, 3 Atk. 693.
Beeston v. *Booth*, 4 Mad. 161.
Taylor v. *Taylor*, 1 You. & Coll. C. 727.
Davies v. *Wattier*, 1 Sim. & Stu. 46
May v. *Bennett*, 1 Russ. 370.

The Lord Chancellor (Lyndhu varied the order by directing a reference the Master, to ascertain the amount of arrears due to Mrs. Stewart and M Mitchell, respectively, at the time of M Stewart's death, and the value of 10,000*l.* 3*l.* per cents. at that time, and directed an abatement to take place in p portion to the respective interests of different parties.

In August 1847 the question was ag raised before the Lord Chancellor Cotte ham, upon a petition of re-hearing. H Lordship varied the order by directing th on the death of Mrs. Stewart, Mrs. Mitch became entitled to the whole of the annui up to her death, and that on her death her r presentative became entitled to the 10,000 and ordered a reference to the Master ascertain the amount due in respect of t arrears of her annuity, and for interest the 10,000*l.* from that time to the death Janet Innes, and the abatement was to made accordingly.

L.C. July 28. } MORTIMER *v.* IRELAND.

1 *Will.* 4. *c.* 60.—*Trustees.*

A testator bequeathed legacies to cert parties for life, with remainders over, a directed the sums to be invested in the na of two persons as trustees. The survivor those trustees died, having bequeathed property held by him in trust to A:—He that A. was not a trustee under the will the original testator, and new trustees w appointed by the Court.

A testator, who died in July 1836, l queathed as follows:—"To my sisters a brother, as hereinafter named, I give, trust, to be invested in the government other good securities as my trustees sh deem to be proper, and beyond which th

ire not to be responsible, to Mrs. Eliza-
beth Williams, for her life, the sum of
2,000*l.*; to Mrs. Maria Cane, for her life,
,500*l.*; to Miss Octavia Mortimer, for her
ife, 2,000*l.*; and to Captain Edmund Mor-
imer, for life, 2,000*l.* The interest on all
hese legacies, in trust, to be paid regularly
the respective parties, as it becomes
ue," with a gift over in the event of the
gatees dying without issue. The testator
ppointed two gentlemen to be his execu-
rs and trustees. The will contained no
ower to appoint new trustees. One only
the persons who were named as executors
nd trustees proved the will, and he died in
346, having made a codicil, whereby he
equeathed to Mr. Ireland, one of his exe-
utors, who was a defendant in this suit, all
roperty vested in him as trustee, upon the
usts affecting the same.

This bill was filed by the *cestuis que trust*, nder the will of the original testator against e personal representatives of both the ustees named in the will; and it prayed for declaration whether Mr. Ireland was or as not duly appointed a trustee under the ill, and for the appointment of a new ustee to act with him, or of new trustees act in his place.

The question which was argued at the ar was, whether the nomination of Mr. reland as trustee, in the will of the sur-iving executor of the original testator, was alid, or whether, upon the death of the xecutor, there was not a vacancy in the rusteeship which the Court alone had any uthority to supply.

The cause was heard before Vice Chancellor Wigram, who ordered a reference to the Master to approve of two new trustees, with liberty to Mr. Ireland to propose himself.

Mr. Ireland appealed from this decision.

Mr. Elderton, in support of the appeal, contended, that the surviving executor of the testator had the power of appointing a successor, and that the property was transmitted from the executor of the testator to the personal representative of the executor—*Tilley* v. *Wolstenholme* (1).

Mr. Wood and *Mr. Jackson* appeared for the plaintiffs, but were not called upon.

(1) 7 Beav. 425; s. c. 13 Law J. Rep. (N.S.) Chanc. 410.

The Lord Chancellor said, that there was nothing in the will which shewed an intention on the part of the testator to place any confidence in the representatives of the original trustees. The property might vest in the personal representatives of the surviving trustee, but they were not placed in such a position as to establish the character of trustees and *cestuis que trust* between themselves and the persons who were beneficially interested in the fund. The decision of the Vice Chancellor was quite right, and this appeal must be dismissed, with costs.

L.C. Aug. 4, 5. } COOPER *v.* EWART.

Solicitor and Client—Taxation of Bill—General Account.

An order had been made for the taxation of a solicitor's bill, and the solicitor was to refund what (if anything) should be certified to have been overpaid. Under such an order, the Master was not authorized to take a general account of all transactions between the parties; but he ought to take into account all monies which were received by the solicitor in that character, and which were applicable by him to the payment of his bill of costs.

The plaintiffs had obtained a common order from the Master of the Rolls, dated the 22nd of October 1838, referring it to the Master to tax the bill of costs of the plaintiffs' solicitors, and it was thereby directed that in case it should appear that such bills were overpaid, the solicitors should refund and pay to the plaintiffs what the Master should certify to have been overpaid. The business to which the bills related was transacted from 1832 to 1836, when a dissolution of partnership between the solicitors took place. One of them afterwards acted for the plaintiffs in obtaining the order of 1838; he had since died, but had been examined before the Taxing Master, and stated that the firm had received various sums of money on account of the plaintiffs, amounting altogether to upwards of 15,000*l.*, and that for some part thereof credit ought to be given as against their bills of costs, but he was unable to state for what part of those sums

credit ought to be so given. The payments made by the firm for the plaintiffs amounted to nearly 13,000*l.* The plaintiffs contended, that they were entitled to have credit for the whole amount of the 15,000*l.*, and that the Master ought to find that the bills had been overpaid by the sum of 2,301*l.* 11*s.* 11*d.*

On behalf of the surviving solicitor it was insisted, that the account between the firm and the plaintiffs was a general account of various dealings and transactions, and not an account of receipts and payments in respect of the bills of costs.

The Master, by his report, stated, that he considered that he was not authorized by the order to take a general account between the said parties, and that he was therefore unable to certify what was due, or whether the bills had been overpaid.

The plaintiffs thereupon presented a petition, praying that it might be declared that the solicitors had been overpaid the amount of 2,301*l.*, and that it might be referred back to the Master to review his report.

The petition came on to be heard before the Vice Chancellor of England, in March 1847.

Mr. R. Palmer appeared for the plaintiffs.

Mr. Cooper and *Mr. Chandless*, for the solicitor, contended, that there was nothing in this case except the materials for taking a long and complicated account. No account had ever been delivered or acquiesced in; still less was there any admission of a balance being due to the clients, as was the case in *Jones* v. *James* (1). There must be a general account, every item of which ought to be investigated, and yet the clients contended that they ought to receive a sum which was assumed to be the balance of this unsettled account. The common form of order, which was made at the Rolls since the act 6 & 7 Vict. c. 73, authorized the Master to go into a general account; but the fact that such a direction was inserted in those orders, was in favour of the argument that in the absence of any such direction the Master had no jurisdiction to go into the general accounts.

Anon. 2 Ves. sen. 452.

Russel v. *Buchanan*, 9 Sim. 167; s. c. 9 Law J. Rep. (N.S.) Chanc. 129, (which was afterwards reversed, b not reported)—were cited.

(1) 1 Beav. 307; s. c. 6 Law J. Rep. (N.S.) Chanc. 293.

The VICE CHANCELLOR, after referri to the facts of the case, stated as follo —I cannot but think, that though is perfectly true that, under the comm order, there cannot be an account tak of all matters in which the persons w acted as solicitors did act, but not in capacity of solicitors (I can underst that that ought not to be comprehen without a special order); yet what stri my mind is this, that consistently with language of Lord Langdale, where find that in a variety of transactions solicitors have been acting in the char of solicitors, and in that character received sums of money for their clients have been actually charging them fo very business which they did in respect receipt of those sums of money, it wou a strange violation of justice to say tha solicitor should be at liberty to keep the of money he received in his pocket, as constituting a general debt from him t client, and that the client is not to hav right of saying that that sum of money properly applicable by the solicitor to payment of the bill of costs. It ra seems to me that that would be introdu a rule which would work very great h ship on those who employ solicitors, who all along suppose that by the re of money the bill of costs is itself in a of liquidation. I think the proper w to make an order that it shall go ba the Master to review the taxation; must declare, that in acting on the made for taxation, the Taxing Maste have regard to the sums of money whic received by the solicitors, in their ch of solicitors, on behalf of these gen their clients.

The solicitor presented a petitio Lord Chancellor, by way of appeal, that the order of the Vice Chancell be discharged.

The case was argued by the sa who appeared before the Vice Ch

The LORD CHANCELLOR.—I se in this case to inquire as to the c of the act, or to go beyond the

the order. The question is, whether the officer of the Court has properly exercised his duty in obedience to the order of the Court, and also whether there is a direction to tax the bills as between solicitor and client. It appears that such bills were to be taxed. Then the solicitors were to refund to their clients what the Master certified to be overpaid. Now, these payments cannot be payments in discharge of a prior bill of costs, because they are not the subject of taxation without a special order. They must rather be payments applicable to the bill of costs, but not sums paid in discharge of a prior bill of costs, and not subject to taxation without a special inquiry, which cannot be the meaning of this order, obtained quite of course. But the question under the order is, in what way the officer is to execute that order. He is to inquire whether the bills have been overpaid. That it is a payment made on account is not in dispute. That a client may ask his solicitor, or a solicitor may ask his client for money, say 100*l.*, on account, is not in dispute. If a solicitor receives money for his client, which he has a right to retain in his character of solicitor, and apply in satisfaction of his bill of costs, that it is contended is not within the province of the Master to investigate: the result of which would be, that if the solicitor receives the sum of 10,000*l.*, the property of his client, and there is a balance of 100*l.*, the client wishing to have the bill taxed must undertake to pay, and must actually pay 100*l.*, although the solicitor has 10,000*l.* in his hands.

Now, if the act has so laid it down, and if the decisions have so regulated it, I should have no power to interfere; but I need hardly say, that unless compelled to come to that conclusion, I should not do so. At the same time I am aware of the great difficulties arising in the construction of orders, in whatever way they may be construed, because it is quite clear there may be very complicated transactions between a solicitor and his client quite unconnected with the duty and office of a solicitor. But if they carry on an account between each other, this Court would not permit the one party to demand from the other an account without having that account altogether taken, and in that way there may be a subject of equitable set-off of accounts pending between them of various transactions, which, it is clear, the officer of the court would have the power to investigate on the taxation of the bill.

But that question is not raised before me at all. The order which I am now to consider, is an order of the Vice Chancellor of England, in which he directs the Master, in taking the account, to have regard to monies which may have been received in the character of solicitor. These were the words, or something equivalent.

Now, therefore, I have only to inquire whether a solicitor, receiving money as solicitor, can compel his client to pay his bill of costs after taxation, without reference to what monies he may have received as solicitor; and the question immediately arises of a solicitor receiving monies out of court for his client. It is said he cannot do that, strictly speaking, *qua* solicitor, but only as an agent, or any other such person. He could not receive it unless he had been a solicitor, and that is the way Lord Tenterden expresses it. He says that he cannot take an account of matters wholly unconnected with his professional character; but that "where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court would exercise this jurisdiction" (2). That is the case; but I do not rely on that authority for the present purpose, because it is plain that there it was not a question of taxation of a bill of costs, but an application to obtain deeds out of the possession of a solicitor, which deeds the solicitor, of course, would be entitled to retain. As solicitor he would have the right to retain the deeds until he was paid.

I need not read the whole of the cases referred to; but I must observe, I do not see how it is possible for the officer to ascertain whether bills have been overpaid or not, without inquiring as to the sums of money that have come to the hands of the solicitor, as solicitor. How can he ascertain that without an inquiry? If a solicitor receives 500*l.* out of court, he has a right to retain it until his bill be paid. He has a right to pay himself, and it must be assumed that he does pay himself, because he exercises a right which the law gives him. Well, is not that payment? Could

(2) *In re* Aitkin, 4 B. & Ald. 49.

the client demand payment from him of 500*l.* without deducting the amount of the bill of costs? Talk of an understanding—can there be a more distinct understanding than that the solicitor who receives money out of court by the authority of his client, is to be paid his bill before the client is to have the sum handed over to him? He may hand it over if he pleases, but that is at his own option. He has a right to retain the money in satisfaction of his costs. But is the client, first of all, to be called on to pay 100*l.*, the bill of costs, and then get, if he can, his 500*l.* out of the solicitor's hands?

If a proposition so extravagant were founded on an act of parliament or were the result of decisions of this Court, I should be compelled, however slowly, to follow it. But I find no such case laid down anywhere. I find the Court continually involved in difficulties, in saying what is or what is not to be taken into account in the exercise of the summary jurisdiction of the Court; but I find it nowhere laid down that monies so received, and coming to the hands of the solicitor, in his character of solicitor, are not to be matter of inquiry before the amount of costs be paid.

In referring to the cases, I may observe that if the cases at law were authorities, I would refer to them. For example, there is *In re Aitkin*, but I do not rely upon it, because it appears to me to be more extensive than the present case, which is merely a question of taxation. Nor do I refer to the *anonymous* case before Lord Hardwicke, because it is a question which did not arise under an order like this. It is undoubtedly the expression of opinion of Lord Hardwicke, on the meaning of the act; but, at the same time, he has expressed himself in such general terms that it is impossible to apply it to the present case. There the items were on a distinct particular order, which was before the Court, and after the act of parliament, but I cannot rely upon it in the present case, except as establishing the general doctrine; and if at law, the practice proved as he has stated it, the latter decisions of the Court would supersede the general observations made at so distant a time as that of Lord Hardwicke.

The case of *Jones* v. *James* was a case that gave rise in a certain degree to the question. It drew out the expression of the Master of the Rolls' opinion on the subject. He says, "In the Master's office th bills of costs were taxed, and the Mast found that certain sums were due; and th next question was, whether there had be any payment. It was proper for the Mast to inquire whether Thomas had in his han money applicable to the payment of t bills of costs, and which he had a right retain for that purpose. When the Ma did inquire he found the sums of 250*l.* 50*l.* admitted to be in the hands of Thom which it is not denied Thomas conside subject to the payment of his bills of c It appears to me to be established Thomas had in his hands money, wh according to the understanding of both ties, was applicable to the payment of bills of costs, and is he to be allowed t that he will not so apply it, in order th may defeat the demands which Harrie on those sums? I think that the Master right on this point; but on the other it does not appear to me that he was in computing interest on the balan Thomas's hands. I must declare that interest is not to be allowed; and if the pa disagree, I must refer it back to the Mast review his report on this point." There t was no agreement for settling anyth The client said, he understood that a of money so coming to the hands of attorney would be retained by the attor in satisfaction of his bill; there is no un standing directly coming from the solici It all rests upon the affidavit or statem made by the client; but it is quite cl there was no agreement. There might h been what the Master of the Rolls cal mutual understanding; that is to say, party receives money belonging to the oth both parties knowing that money so recei was applicable to the payment of the bi and of course they both understood it wo be so applied. That is no more than th has been in this case, and every other c where a solicitor receives money, and ha bill against the party, which he is entit to pay out of the monies so received. there were a distinct agreement, of cou the Court would not interfere.

The case of *Jones* v. *James* I conside be directly applicable to the present c It is proper to inquire whether he monies applicable to the payment of bills of costs which he had a right to re for that purpose; and, beyond all do

being the rule, and these are the very
ls in which the Master of the Rolls lays
own, the inquiry would be whether
es coming to the hands of the solicitor,
is character of solicitor, are not appli-
to the payment of the bills of costs;
without referring to the other cases, I
just refer to what the Master of the
is reported to have laid down in the
volume of the *Law Journal*(3). There
peared that there were sums of money
h had come to the hands of the solici-
ubject to a distinct application to the
t. In the petition, on which the order
axation was obtained, Mr. Husband
claimed to have an account of the
actions between him and Smith, and
parts of the petition having been re-
l, the order was so framed as to exclude
ccount of the payments not made on
nt of the bill. He applied to the
t for a special order, assuming that,
out such special order, the accounts
e investigated would not be open to
tion. The Master, of course, refused
he so applied for; and, therefore, he
the common order, without inquiring
the payments or transactions were.

is quite clear that there were trans-
ns foreign to the question of taxation,
wise he would not have made a
al application, and not have been re-
l. It appears, however, that notwith-
ling that, he afterwards complained be-
e the Master had not made an inquiry.
with respect to that case, the Master
e Rolls' observations are strictly in
rmity with what arises in the case of
v. *James*. He says, "Notwithstand-
he very great importance of keeping the
diction of the Court, in cases of this
, within its proper limits, and the
riety of directing the Master to have
d only to sums paid on account of the
in ascertaining what is due in respect
em, it is not improbable that, on the
ideration of what payments have been
e on account of the bills, questions of
and of fact of considerable difficulty
incidentally arise, and possibly justify,
even require discussion and determin-
n even in this jurisdiction. When such
tions do properly arise it will be the
of the Court to avail itself of all the
means which it possesses to have them investigated and settled, according to law and justice; but in a case where the Master has received no special directions from the Court, I think it was his duty to confine himself to the simple payments, plainly proved to have been made on account of the bills, and that he would not be authorized to allow, as against the bills of costs, sums of money not plainly appearing to be such payments."

That is what he says with respect to the subject-matter before him, and, therefore, he refused to permit the party to include in the inquiry payments made not with reference to the bill of costs, and therefore not to be taken into account by the Master, whose duty it was simply to tax the bill, and to ascertain whether they have been overpaid.

There is another case, *Russel* v. *Buchanan*, a case before the Vice Chancellor of England, who went a great deal further than the Master of the Rolls went in this case. But I am informed the Vice Chancellor was in error, and afterwards corrected. This report takes no notice of that circumstance. However it shews this, that the Vice Chancellor, himself, in his own private opinion, thought he could not go so far as by the order he did go, for the Vice Chancellor thus expresses his opinion of the general practice: —He said, "It was not generally true that all matters pending between a solicitor and his client were to be investigated under the common order for taxation of the solicitor's bill: that he was clearly of opinion that the Master, in this case, had nothing to do with either of the two sums of 421*l.* 5*s.* 9*d.* and 42*l.* 2*s.* 7*d.*: that with respect to the account between the plaintiff and petitioner, on which a balance of 113*l.* 11*s.* 5*d.* was alleged to be due to the plaintiff, he was inclined to think that the plaintiff ought to have had a special direction for taking that account inserted in the order, but that he would consult the Masters upon the point." And, therefore, the Vice Chancellor negatived it, as he believed a matter of this sort was not in the jurisdiction of the Court. He says, it is not generally true that the Master is to investigate matters pending between solicitor and client, but presumes the difficulty arises that they were not within the jurisdiction of the Court; but he goes on to say "that he had consulted the

) *In re* Smith, 15 Law J. Rep. (N.S.) Chanc.

Masters on the point mentioned above, and that they were of opinion that, under the common order for taxing a solicitor's bill, the Master was bound to take a general account between the solicitor and client, and therefore he should refer it back to the Master to review his certificate, so far as he had certified that he conceived that he was not authorized by the order to take a general account of the receipts and payments of the defendant, as agent for the plaintiff, and that he was unable to ascertain how much (if any) of the sum of 361*l.* 14*s.* 6*d.* then remained unpaid."

So that he was satisfied by what he had learned from the Masters, that he was to go into the general account, for the purpose of ascertaining what was due to him in that respect. And he referred it back generally; and that certainly was going a great deal further than he has gone in this case, and further than it is necessary for me to make any observation upon, because I am only on the Vice Chancellor's order, and that is now confined to taxing the bill. I must have regard to what monies have been received by the solicitor in his character of solicitor; and having gone through all the cases, I find there is not one of them that lays down the rule that monies so received by a solicitor were not to be taken in the account. So that it is quite obvious that the course of proceeding is one of very great difficulty in any way. But that question I have not to deal with at present. I am on the question whether the general account ought to be referred to the Master. I think it would be going too far to say that a solicitor is to claim payment of his bill of costs, without an inquiry what sums had come into his hands in his character of solicitor, and also whether he would have the right to retain them against his bill of costs. If the course of proceeding had been otherwise, it would have been an injustice, which this Court would have struggled against, even if there were more difficulties in the case than I find there are. All the cases assume that money coming to the hands of a solicitor (although not actually coming from the client) is to be set off against his costs, and that the Master had a right to go into the accounts generally. Then the Vice Chancellor says, that money, which is not to be retained, coming to the hands of the solicitor, he can compel the client to pay the amount bill; and that by law he has a apply it in satisfaction of such bill necessary to observe the language Master of the Rolls, in *Jones* v. He says there may have been an standing between the parties that the so received would have been so appl

Without putting it on the groun understanding, and keeping simply terms of the order, I cannot und how the Master possibly could a whether the amount of costs had bee paid, without ascertaining what s money the solicitors received, appli such payment. Therefore I consi Vice Chancellor's order is confined t and in affirming the Vice Chancell cision, I express no opinion beyond necessary to shew the grounds on think the Vice Chancellor has p decided the case. I shall, therefore that decision, and dismiss the appe costs.

V.C.
April 19, 24; May 24. } GERVIS *v.* GERVI

Marshalling Assets — Specific l and Devisees.

A testator, by his will, gave certa cific legacies, and devised his real e manner therein mentioned. Previo his death the testator had purcha estate, but had left part of the pu money unpaid:—Held, that the legatees and devisees were to co proportionally to the payment of the purchase-money.

Cornewall v. *Cornewall* (1), *overr*

Sir George W. Tapps Gervis, will, dated the 22nd of January 18 vised all his real estate in manner mentioned. The testator then made specific devises and bequests, a queathed to his executors certain s stock, and also a leasehold hous directions to raise portions for his y children. The testator afterwards d of his residuary personal estate, a clared that such estate should be sul

(1) 12 Sim. 298; s.c. 10 Law J. Re Chanc. 364.

:uniary legacies therein specified. :or, on the 8th of August 1835, ased an estate, called the East :e, but had not paid the whole of ıse-money. Upon the death of r, it appeared that his personal specifically devised, was insuffi- ıy his debts. The bill was filed of the younger children of the and the questions now raised of what fund the residue of the noney for the East Close estate ɔme, whether the specific legatees charged before the devisees, or ɔth the specific legatees and the ere to contribute proportionally.

lt and *Mr. Lewin*, for the plain- ɜnded that the real estate must ɜbts proportionally with the lega- the same rule must hold good ıld apply to the case of an equit- age. Here the vendor had a lien ɜstate, and it was evident that an nortgage would in every case be he same. It was, in fact, a right particular sum paid out of a parti- e. A vendor's lien and an equit- ɜe were exactly the same: there be any real difference pointed out ıem. It would be impossible to vendor's lien without using terms plicable to an equitable incum- The testator had expressed an n this case, that each should take gift; and it was evident that the e which could be adopted was to rateable contribution must take his case was expressly decided in *hort* (2).

owing cases were also cited :—

s v. *Leigh*, Cas. Temp. Talbot,

ter v. *Lord Leigh*, Ambl. 171.
r v. *Preswick*, 2 Ves. sen. 622.
ı's Vend. and Purch. vol. 3, 04.
ı v. *Coppin*, 2 P. Wms. 291.
er v. *Bayne*, 9 Ves. 209.
ɜy v. *Readhead*, Coop. 50.
v. *Selby*, 4 Russ. 336; s. c. ıw J. Rep. Chanc. 117.
e v. *Prior*, 8 Sim. 189; s. c. 6 J. Rep. (N.S.) Chanc. 1.

(2) 1 P. Wms. 403.

Silk v. *Prime*, 1 Dick. 384.
Roper on Legacies, vol. 1, p. 829.

Mr. J. Parker and *Mr. Leach*, for the devisee of the real estate, contended that the real estate was not liable to the debts of the testator, until after the specific legatees; that in administering an estate the legatees' fund must be exhausted before that of the devisees, and that a specific legatee would be in no better position than a general legatee as against the devisee of real estate; and a creditor would have no right to resort to the real estate until the personal estate was exhausted. A testator, in purchasing real estate, shewed a clear intention to increase his real estate at the expense of the personal estate. This debt must be treated as an ordinary specialty debt, and the general principle of the Court had always been not to break in upon the real estate before the personal estate had been applied in payment of such debts.

The following cases were cited :—

Cornewall v. *Cornewall*, 12 Sim. 298; s. c. 10 Law J. Rep. (N.S.) Chanc. 364.
O'Neal v. *Mead*, 1 P. Wms. 693.
Wythe v. *Henniker*, 2 Myl. & K. 635; s. c. 3 Law J. Rep. (N.S.) Chanc. 24.
Austen v. *Halsey*, 6 Ves. 475.
Mackreth v. *Symmons*, 15 Ves. 329.
Mirehouse v. *Scaife*, 2 Myl. & Cr. 695; s. c. 7 Law J. Rep. (N.S.) Chanc. 22.
Haslewood v. *Pope*, 3 P. Wms. 322.
Pollexfen v. *Moore*, 3 Atk. 272.
Clifton v. *Burt*, 1 P. Wms. 679.
Silk v. *Prime*, 1 Bro. C.C. 138, n.
Tombs v. *Roch*, 2 Coll. 490; s. c. 15 Law J. Rep. (N.S.) Chanc. 308.
Young v. *Hassard*, 1 Jones & Lat. 466.

Mr. Stuart and *Mr. Elmsley* appeared for the trustees.

Mr. Rolt replied.

The VICE CHANCELLOR.—I have considered the point in this case, and I will tell you exactly how it strikes me. I am now speaking of the general point, and from the way in which the case was opened I have not searched into the papers, which are rather voluminous, to see what the particulars of the case were; but I understood from what was said, it would be quite sufficient to determine the general point, which is this: an estate was contracted to be purchased, and the whole of the purchase-money was not paid, and therefore the vendor would have his lien

on the estate for the unpaid purchase-money, and the estate has been devised, and there has been also a specific devise. The assets being insufficient, the question is whether there shall be a rateable contribution as between the devisee of the land and the specific legatee, or whether the whole must be borne by the land or the whole of these legacies first applied, and then the residue paid out of the land. Now, when the case of *Cornewall* v. *Cornewall* came before me, I recollect, at the close of the argument that I sent for my book, which I have here in my hand, that contained the case of *Long* v. *Short*, in which I had long before made the observation which I then stated, and which it appears is mentioned in the reported case, that Lord Talbot had appeared to have decided differently in the case of *Haslewood* v. *Pope;* and I have noted down in my book, as the supposed reason for the difference, that the Statute of Fraudulent Devises was made for the benefit of creditors, and not of legatees; and on that view of the case, and what was said at the time, I certainly thought it was right there to make the specific legatee liable in the first instance, and not proceed on the principle of contribution. Since that has been decided by me, there has been that very laboured decision of Vice Chancellor Knight Bruce, in the case of *Tombs* v. *Roch*, and also the observations made in the case of *Young* v. *Hassard*, in *Jones & Latouche*, which I have read very particularly: and this decision of *Tombs* v. *Roch*, I must say, appears to me to be extremely valuable, because it is accompanied not only by a statement of the original decree in *Silk* v. *Prime*, decided by Sir Thomas Sewell, but it also states that the Vice Chancellor Knight Bruce has himself seen the decree which was actually made in *Haslewood* v. *Pope*, and it turns out that the report in *Peere Williams* was evidently incorrect, because the report commences in this way:—"In this cause the following points were decreed by the Lord Chancellor," and it turns out, on inspection of the decree, as Vice Chancellor Knight Bruce stated it, that there was no such point decided by that decree; and it appears to me, therefore, that whatever might be the authority attributable to my Lord Talbot as a Chancellor, which was very great, there is a manifest error here in the statement made by the report and it appears that in this very third volu of *Peere Williams* I noted down an obs vation which my Lord Eldon made on 12th of November 1821. Lord Eldon s the cases in the third volume of *Pe Williams* were not of equal authority the cases in the first and second volum the cases in those volumes were publis in P. Williams's lifetime, and he did publish the cases in the third volume, cause he did not consider them of e authority. Now, that is a general ob vation on the whole of the publication. it stands in this way, that Lord Chanc Cowper, in the case of *Long* v. *Short* question being expressly raised, did pressly decide that the specific le should contribute rateably with the sp devisee; and in the case of *Silk* v. *Prim* the note subjoined to *Tombs* v. *Roch*, was the same thing expressly decided by Master of the Rolls of the day. "His H nour declared that the deficiency was to made good out of the said testator's pers estate specifically bequeathed, and the re estate devised by his will to Sarah Tho son, his mother, in fee, and the said est were to contribute in proportion to such ficiency." Now, I must say, I think I bound by these two decrees, which app on inspection, not at all to be affected anything that is stated in the third vol of *Peere Williams* to have been done: cause the statement is, that this was decree, and it turns out, as a matter of f that there was no such decree; and if y find the reporter wrong, with respect to statement of the fact that there was suc decree, you can have no very great secur for his accuracy in stating that my L Chancellor had ever stated what is said be contained in the fifth resolution; a my opinion is, in this case, notwithstandi what I decided in *Cornewall* v. *Cornew* that the decision must be according to principle of *Long* v. *Short* and *Silk* *Prime*; and I am sure if one makes error in judgment, it is always a matter satisfaction not only to be able to set right, but to set it right in a manner t affords no doubt: because of the error of decision in *Cornewall* v. *Cornewall* I now fully satisfied.

}. } MAPP v. ELLCOCK.

—Undisposed of Residue—Exe-

tor, who died in 1789, by his will his property to the defendant upon f trusts, which did not exhaust the neficial interest in the estate; he inted the defendant his executor: that the executor took the undis- residue for his own benefit.

l Henry Pare, a barrister, the tes- his cause, made his will in 1785, iding in the island of Barbadoes, ollowing terms: — "Imprimis, I ny estates, both real and personal, island or elsewhere, to Edward Esq., his executors, administrators, s, to and for the several uses, and purposes following, that is to f the rents, issues, and profits, and f all debts due to me, to pay to wife Anna Maria, 300*l.* yearly year, in addition to her own for- ich survives to her, and in trust to permit and suffer her to have njoyment of the uses and services negro slaves, except Jackey, whom o be freed at the expense of my d in trust to permit her to use all hold furniture and plate during al life, and in trust also to receive st only of the debt due to me from ttyjohn, Esq., during the lives of J. Prettyjohn and his son and and in trust likewise to discharge J. Prettyjohn from the sum of which sum I bequeath to his said lren." The testator then made ther bequests, and appointed the E. Ellcock executor of his will. tor died in 1789. The suit was for the administration of the the testator, and a reference had cted to the Master to inquire who next-of-kin. The Master had t the plaintiff was the sole next- The cause now came on upon fur- tions, and the only question argued ther the residue, which was undis- by the will, went to the executor next-of-kin of the testator.

tuart and *Mr. Lake Russell*, for the plaintiff, contended that there was a clear intention expressed upon this will, to give the property clothed with a trust, and not to give a beneficial interest to the executor. The whole of the property was given upon trust, and the implication was, therefore, against the executor.

The case of *Mullen* v. *Bowman* (1) was cited.

Mr. Bethell and *Mr. Sandys*, for the executor, submitted that this case must be decided by the old law as it stood before any of the late acts of parliament respecting the disposition of the residue, where there was no express residuary legatee; under which law the general rule was, that the executors, in whom, by virtue of their appointment to that office, the whole estate vested, took such residue for their own use. In this particular case, the testator, by lastly appointing an executor, must have intended that to be the last of the purposes for which the property was to be given: the legal effect of which purpose was to vest the beneficial interest in the executor, so far as it had not been before disposed of. This case resembled that of *Dawson* v. *Clark* (2), before Sir William Grant, in which, although the decision of Sir William Grant was afterwards reversed by Lord Eldon upon another ground, the opinion of Sir William Grant, upon this point, was left untouched.

The case of *Rhodes* v. *Rudge* (3) was also cited.

Mr. Piggott appeared for another party in the suit.

Mr. Lake Russell, in reply, contended that Lord Eldon had disapproved of the opinion of Sir William Grant in *Dawson* v. *Clark*.

The VICE CHANCELLOR.—This case depends, as all these cases do, upon the language which is to be found in the specific case itself. It is quite plain that Sir W. Grant entertained a very clear opinion that the appointment of an executor, where it is a separate thing in the will from the mere gift of the property to the person named as executor, would have the operation of giving

(1) 1 Coll. 202; s. c. 13 Law J. Rep. (N.S.) Chanc. 342.
(2) 15 Ves. 409; s. c. 18 Ves. 257.
(3) 1 Sim. 79; s. c. 5 Law J. Rep. Chanc. 17.

it to the executor for his own benefit simply, that was all; and, therefore, in the case of *Dawson* v. *Clark*, where, in the first instance, there was a gift to persons named upon trust of all the property, and, afterwards, there was a separate nomination of them as executors, he held that that second nomination operated, in point of law, to give them everything, except so far as it had not been given away; and though my Lord Eldon seems to be rather against that opinion, yet it appears to me he does not allude to the bequest precisely as it came before Sir W. Grant, but rather as if it was in another form. He says (and it is not an opinion expressed with much confidence), "My great difficulty in this case is not upon the effect of a devise and bequest of real and personal estate to trustees upon trusts, those trusts expressed not exhausting the whole interest; a case upon it is very difficult to maintain; that, as they are afterwards named executors, they are to have what is not exhausted of the property they take as trustees." He does not enter into any consideration of the subject; he does not allude to the thing that appears so prominent in the report of the case before Sir W. Grant, namely, that the effect of naming them as executors is, *primâ facie*, a gift, and these cases never would have arisen if that were not the effect. Then he says, "But the difficulty I feel is whether I am to construe the words 'upon trust' to mean 'charged and chargeable,' or 'charged and chargeable' to mean 'in trust,'" and he ultimately does decide upon the effect of the devise in the bequest in the first part of the will, that they took it as devisees only, charged and chargeable; and, therefore, so far as the charges might extend, they take as devisees for their own benefit, which, to say the least of it, is as fine a construction as the construction of Sir W. Grant, that the subsequent independent nomination of the party to whom the bequest is before made as executor, is to operate in itself as a gift to the party. Sir W. Grant's opinion has not been overruled, and you find the very same learned Judge, in a subsequent case of *Southouse* v. *Bate*(4), refer to this opinion of his, expressed in *Dawson* v. *Clark*, stating that he adhered to that opinion; and it

(4) 2 Ves. & Bea. 396.

does not appear to me that there i
considerable difference between t
where the gift in trust is, in the
stance, to persons named as execu
where the gift in trust is to person
who afterwards, by an independer
of the will, are appointed executors
I must say, I rather thought t
Bethell was labouring not quite so
favour of his client when he would
on me the necessity of taking tl
"lastly" and the sentence that fo
part of the original bequest; but
seems to me, in the first place, tl
not so: and the effect of that not
is this, that then the Court is a
to consider what is the effect of th
after having, to a certain extent, d
the trusts, saying, distinctly, "I n
constitute, and appoint the afore
Ellcock executor of this my last wi

Now, the testator begins—"I
I give all my estates, both real a
sonal, in this island or elsewhere, to
Ellcock, (describing him,) his ex
administrators, or assigns, to and
several uses, intents, and purposes fo
that is to say;" and then I have
that there are no less than seven p
which he uses the expression "i
the first declaration of trust com
in this manner:—"That is to say
the rents, issues and profits, and inter
debts due to me:" there, it is true, tl
"in trust" are not used, but in th
next sentences you have seven repet
the words "in trust;" and I can
think, therefore, that all the s
which precede the last sentence
commences with the word "last
merely a declaration and expansion
the testator, in the first part of t
calls "the several uses, intents, a
poses following."

Now, upon the face of the wi
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appears to me to be a remarkabl
because the testator might have go
give legacies and so on, and not ha
aware whether he was disposing
whole of his property or not. Bu
you find the fact apparent to the
the testator himself that the trust u
face of it did not exhaust the whole

in a great part of the property, it is quite obvious it must have been present to his mind that the remaining interest in the property was still a subject for disposition; and I allude particularly to this trust, "in trust to permit and suffer her," that is, his wife, "to use all my household furniture and plate during her natural life." It is quite plain, therefore, if it were not used during her natural life, it not being one of those things *quæ ipso usu consumuntur*, that there would be an interest remaining after the execution of the trust, which might be disposed of; and then I find the testator, having declared all the trusts upon which the property was given to the party, his executors, administrators, and assigns, saying, "Lastly, I nominate, constitute, and appoint the aforesaid E. Ellcock executor of this my last will." It rather appears to me the true meaning of those words is, that he shall be executor, that is, take everything that I have not yet given away, and execute the office of executor. It rather appears to me that is consistent with the general import of the words, and consistent with the solemnly repeated opinion of Sir W. Grant; and it appears to me that whatever the inclination of Lord Eldon was to disturb this, he did not think it a case in which he could disturb it, and, therefore, I have an express decision, which I am bound to follow.

V.C.
May 7;
June 1.

WARE *v.* ROWLAND.

Legacy—Heir-at-Law—Period of Vesting.

A testator directed his trustees to set apart a sufficient sum out of his estate to produce 600l. per annum, which was to be paid to his daughter for life, with remainder amongst her children, and if at the death of his daughter, she should have no child or children living, or they should not live to attain twenty-four years, he directed his trustees to sell out the trust monies, and pay thereout certain legacies; and all the rest and residue of the said principal trust monies the testator gave and bequeathed to and among his heirs-at-law, share and share alike. The testator's daughter died without issue:—Held, that this was a gift of the remainder to the persons who, at the time of the death of the testator, answered the character of his heirs-at-law.

This bill was filed for the administration of the estate of Philip Slater, who made his will, dated the 18th of July 1806, whereby the testator directed his trustees to lay out so much money in the 3*l.* per cent. annuities, as would produce the sum of 600*l.* per annum, and to pay to or permit his wife, Ann Slater, to receive the said annuity for her life; and from and after the decease of his said wife, the testator directed his surviving trustees to invest the said sum of stock, in their names, in trust, for his daughter, Anna Maria Slater, and to pay or apply the said annuity of 600*l.* to her for her separate use for life; and from and after her decease, then upon trust to pay and apply, assign and transfer, distribute and dispose of the said principal trust monies, with the interest and dividends thereof, unto and amongst the children of his said daughter, share and share alike, at their respective ages of twenty-four years, and not before, and to apply so much of the dividends and interest thereof as should be necessary for their maintenance and education in the mean time; and, if at the death of his said daughter, she should have no child or children living, or he, or she, or they should die under the age of twenty-four years, then his said trustees and the survivors or survivor of them, or the executors or administrators of such survivor should sell out the trust monies, with the interest and dividends thereof, and pay thereout to his son-in-law, John Giles Christian, and his grandson, the defendant, George Tempest Rowland, 500*l.* each, if they should severally be alive at the said time. And as to all the rest and residue of the said principal trust monies, with the interest, increase, and dividends, the said testator bequeathed the same to and among his heirs-at-law, share and share alike. And the said testator gave, devised and bequeathed all the rest, residue, and remainder of his estates, both real and personal, and of whatever kind, in reversion, expectation, or possession, together with all bonds, writings, and securities for money and foreign debts unto his daughter, the

said Anna Maria Slater, and her heirs for ever. The widow of the testator died in 1815, and his daughter, who was his heiress-at-law at the time of his death, died afterwards without issue. The cause now came on upon further directions; and the only question argued was, who should be entitled to the sum of stock which had been purchased in by the trustees for the purpose of producing the said annuity of 600*l.*

Mr. Glasse and *Mr. Ware* opened the case for the trustees.

Mr. Bethell and *Mr. Hetherington* appeared for the defendant, George Tempest Rowland, the grandson of the testator, and the administrator of the estate of Anna Maria Slater, and cited *Urquhart* v. *Urquhart* (1), and the cases therein cited and reviewed.

Mr. Humphrey and *Mr. Bates*, for the next-of-kin of the testator, contended that as regarded the personal property, the words "heirs-at-law" meant next-of-kin, and that the next-of-kin, at the death of Anna Maria Slater, were entitled. It was true that in some cases the heirs-at-law might take personalty; but under this particular will, it was clear that the testator meant the next-of-kin at the death of his daughter to take.

The following cases were cited:—

Holloway v. *Holloway*, 5 Ves. 399.
Jones v. *Colbeck*, 8 Ibid. 38.
Evans v. *Salt*, 6 Beav. 266.
Clapton v. *Bulmer*, 5 Myl. & Cr. 108; s. c. 9 Law J. Rep. (N.S.) Chanc. 261.
Mounsey v. *Blamire*, 4 Russ. 384.
Gittings v. *M'Dermott*, 2 Myl. & K. 69; s. c. 2 Law J. Rep. (N.S.) Chanc. 212.
De Beauvoir v. *De Beauvoir*, 15 Law J. Rep. (N.S.) Chanc. 305.
Gwynne v. *Muddock*, 14 Ves. 488.
Elmsley v. *Young*, 2 Myl. & K. 82, 780; s. c. 3 Law J. Rep. (N.S.) Chanc. 17; 4 Law J. Rep. (N.S.) Chanc. 200.
Withy v. *Mangles*, 4 Beav. 358; s. c. 10 Law J. Rep. (N.S.) Chanc. 391.
Minter v. *Wraith*, 13 Sim. 52.

Mr. C. P. Cooper and *Mr. Heathfield* appeared for one of the next-of-kin of the testator at the time of his death, and cited—

(1) 13 Sim. 613.

Wilkinson v. *Garrett*, 15 Law (N.S.) Chanc. 416.
Seifferth v. *Badham*, Ibid. 34

Mr. James Parker contended words "heirs-at-law" must mean kin, and cited *Bird* v. *Wood* (2).

Mr. Rolt and *Mr. Sheffield*, for t at-law of the testator at the death Maria Slater, contended that th "heirs-at-law" were to be read natural sense, and to be ascertain decease of the daughter.

Mr. Younge and *Mr. Bazalgette* for another heir-at-law of the test cited *Briden* v. *Hewlett* (3).

The VICE CHANCELLOR.—I ad considerable difficulty arises in th construing this will. If the true the case is, that the bequest is uncertainty, then the daughter, wh next-of-kin at the death of the would take. After all that I ha and it has been very fully argued, opinion is this, that I am bound to it in the simplest and plainest r can. With respect to the claims next-of-kin than those at the tin testator's death, or rather I should respect to the claims of any pers than those who are clothed with th ter of heir, it appears to me that th ground for holding that they have because the testator has himself construction upon the meaning of "heirs." It cannot be argued, I th there is any substantial difference the word "heirs-at-law" and "heir struck me when the cause first cam very remarkable thing, that in the g "residue" to his daughter and her has there shewn that the word "he be taken in its ordinary sense, na heirs of the daughter. Then I fir another place speaking of his "heirs and surely they must be taken to in one sentence in the same sense they are taken to be heirs in an though, I admit, the ancestor of th is different. The only thing th

(2) 2 Sim. & Stu. 400; s. c. 4 La Chanc. 86.
(3) 2 Myl. & K. 90; s. c. 1 Law J. 1 Chanc. 114.

mind presents a doubt is, whether by the form of the gift of that fund which was to raise 600*l.* a-year, the persons who are named to take are persons capable of taking in remainder at the time of the testator's death, or persons who are only to come into *esse* at a time subsequently to the death of the testator. With respect to that the testator has directed, that there should be set apart a certain fund to produce 600*l.* per annum, which is given so as to be for the separate use of the daughter during her life, with remainder amongst the children; and then there is this direction: "and if at the death of my said daughter she should have no child or children living, or he or she or they should die under the age of twenty-four years, then I direct my trustees and the survivor or survivors of them, or the executors or administrators of such survivor, and such new trustee or trustees as aforesaid, to sell out the said trust monies with the interest and dividends thereof, and to pay thereout." The sentence is not very well constructed, but it rather appears to me that it is a direction to sell so much as with the interest and dividends would yield the sum specified, and not a direction to sell the whole. Then it goes on: "and to pay thereout to my son-in-law," that is one person, "and my grandson," another person, "500*l.* each, if they be severally alive at the said time." Now there is no doubt that to them the gift was contingent, but if they answer to the contingency so as to be alive, then there was to be 500*l.* paid to each of them, and then the words follow: "all the rest and residue of the said principal trust monies, with the interest, increase, and dividends, I give and bequeath to and among my heirs-at-law, share and share alike." There might have been, for anything the testator could tell, persons of that description at the time of his death, and there might not; but the mere circumstance that there might or might not only amounts to this, that if a plurality of persons fill the character of heir, that plurality was to share equally; but if the character of heir was filled by one person only, then, of course, there would be no division. It was utterly uncertain what might be the event. I cannot assume as a fact that the testator knew, for instance, that his daughter was his heir-at-law; that is a matter of fact which does exist in the cause before me—he might or might not have known it. I go by the mere words of the will; and it appears to me that there is not such a sufficient binding connexion of the parties to take under the description of "my heirs-at-law" with the time pointed out by the contingency, as to shew that those only are to take who would answer the description at a particular time: and it appears to be a mere gift of the remainder to the persons who, at the time of the death of the testator answered the character of his heirs-at-law; and if that is not the construction, I admit that the thing is so complicated and confused that it is void for uncertainty, and then the daughter would take.

L.C.
July 10, 14, 17. } GLASCOTT *v.* LANG.

Ship and Shipping—Bottomry Bond—Pleading—Allegations of Fraud.

A bill was filed to set aside a bottomry bond, which had been given at Trieste, without any communication from the captain to the owners in England, and, as was alleged, by a fraudulent conspiracy between the captain and the obligee. The Court supported the bottomry bond, but, instead of dismissing the bill, did, at the request of the defendant (the obligee) direct inquiries as to the amount due to him upon the bond.

Practice of the Court as to dismissing a bill and refusing secondary relief, where allegations are made of fraud which is not proved.

In September 1835, a ship, called the *Margaret Ogilvie*, which was then at London, was chartered by Messrs. Freeland, Ker, & Co. to go to the Clyde, where she was to take in her cargo and proceed to Rio de Janeiro. After unloading at Rio, she was to take another cargo to some port in the Mediterranean, where the charterers were to pay the freight, less 300*l.*, which was to be paid upon the ship leaving the Clyde, "and what money she might take up for the ship's use, at any port or ports of lading and delivering, not exceeding 100*l.*" The vessel performed the voyage to Rio, and thence proceeded, with a fresh cargo,

to Trieste, where she arrived on the 9th of October 1836.

In October 1835 the owners executed a mortgage of the ship to the plaintiffs; and in September 1836 the plaintiffs forwarded a notice of their mortgage to the agents of the charterers at Glasgow, and applied to them for an account of the freight. The agents informed the plaintiffs in reply, that they had already settled with the owners for the freight. The plaintiffs, thereupon, wrote to their agents at Trieste, Messrs. Reyer & Schlik, directing them to serve a notice of the mortgage upon the captain of the ship, and to direct him to endeavour to get a freight home from Trieste, and to bring the ship to England, as the plaintiffs intended to sell her. They also directed Messrs. Reyer & Schlik to advance any sums which might be required for the use of the ship for the voyage home. The ship remained at Trieste till the 19th of December 1836; and during her stay there, the captain executed a bottomry bond, to secure 483*l.* 10*s.*, with 14 per cent. maritime interest, in favour of Mr. John Bryce, who was one of the partners in the firm at Trieste of Messrs. Lang, Freeland & Co., who acted as the agents of Messrs. Freeland, Ker & Co., the charterers of the vessel.

The vessel received another cargo at Trieste, and arrived at London, in January 1837. Immediately upon her arrival, the plaintiffs took possession of her, as mortgagees. They received the homeward freight, which amounted to 300*l.*, and they sold the ship for about 1,600*l.* The obligee then threatened proceedings in the Admiralty Court to enforce the bottomry bond, and the plaintiffs instituted this suit to have the bond declared fraudulent and void, and to obtain an injunction to restrain the obligee from proceeding to enforce the bond.

The bill contained several charges of fraud, and that no money had ever been advanced to the captain at Trieste, but that the bond was given for the purpose of postponing the claim of the mortgagees.

It appeared that, in addition to the 300*l.*, which had been paid according to the agreement upon the ship clearing out of the Clyde, several sums had been advanced by the charterers for necessaries for the ship, both at the Clyde and at Rio, and that these sums amounted altogether to 975*l.* 5*s.* 1*d.*, while the freight payable at ' was only 790*l.* 16*s.*, leaving a bala 184*l.* 9*s.* 1*d.* due to the charterer the laws of Trieste, the vessel was li be sequestered for that sum, and a the money which was due to the cre which the crew demanded.

Messrs. Lang, Freeland & Co. ad to the captain, at Trieste, 299*l.* 0*s.* 1 the use of the ship, which, being ac the 184*l.* 9*s.* 1*d.* already due to the terers, made up the whole amount o 10*s.*, for which the bond was give was admitted that the charterers had of the mortgage before they made a vances in the Clyde, and that the been plenty of time for the captain t written from Trieste to the mortga England, and to have received an before he executed any bottomry and also that the captain had ma application to Messrs. Reyer & Sch any advance.

An injunction had been obtained other proceedings upon the bond, a amount of it had been brought into co

The cause was first heard befor Chancellor Knight Bruce, who decre the bond ought to be delivered up cancelled.

The defendants appealed from tha sion.

Mr. Russell, *Mr. Heathfield*, an *Prendergast*, for the plaintiffs, cont that to support a bottomry bond, th ties must shew that there was so damage or danger to the ship that t lay was unavoidable; that no suc existed here; that there was no di in communicating with the owner Trieste, and therefore the captain w authorized to give a bottomry bon that part of the money secured by th was a debt contracted long before. cited—

Heathorn v. *Darling*, 1 Moo. P.C
Soares v. *Rahn*, 3 Ibid. 1.
The Nelson, 1 Hag. Ad. Rep. 1
The Lochiel, 2 Robertson Ad. R
La Ysabel, 1 Dods. Ad. Rep. 2
The Augusta, Ibid. 283.

Mr. Wigram and *Mr. Stinton*, f defendants, insisted, that all the mo

(1) 8 Sim. 358; s.c. 3 Myl. & Cr. 45

which the bond had been given, had been expended upon the vessel, and that, without that outlay, she could not have performed her voyage; that a bottomry bond might be given for money which was previously due—*The Hebe* (2); that no case was made by the bill that the captain might have communicated with the mortgagees from Trieste, but the case rested altogether upon the imputations of fraud; that no case of fraud had been made out, and that the bill ought, therefore, to be dismissed.

Dobson v. *Lyall*, 2 Phill. 323, n.
Kerswill v. *Bishop*, 2 Cr. & Jer. 529; s. c. 1 Law J. Rep. (N.S.) Exch. 227.
The Alexander, 1 Hag. Ad. Rep. 278.
Abbott on Shipping, 155.

Mr. Russell replied.

July 17.—The LORD CHANCELLOR.—In this case the bill is filed, and the prayer of the bill is, that a certain bottomry bond may be delivered up to be cancelled; and an injunction dependent upon the equity is prayed; and the bill makes a case of actual fraud, states the circumstances, and then states that the plaintiffs have recently discovered that the bottomry bond was not given for any money necessary for the outfit of the ship, that it was entirely a contrivance between the party who had the command of the ship and the agents of the charterers at Trieste, and that they all combined together for the purpose of excluding the plaintiffs, who are mortgagees of the ship, and that the bottomry bond was unnecessary, uncalled for, and a mere machinery for the purpose of gaining priority of certain demands over the mortgage debt of the plaintiffs. Now, this case has wholly and entirely failed: there is no case of fraud made out at all. If there is any question about the right of the parties to recover upon the bottomry bond, it does not necessarily form any portion of the contention as to how far the money secured by the bond comes within the rule, which authorizes captains of ships in foreign ports to take up money on bottomry bond.

Now, the case may be fairly stated as a case of fraud: it is quite unnecessary at present to go into any details of those matters which are introduced into the bill not by way of substantial statement, by way of making out the case, which the plaintiffs charge in the bill; but it is introduced by way of answer, or, more properly speaking, in anticipation of what was supposed to be the defence to be raised by the defendants, namely, that there were certain circumstances which gave him a right, if true, to raise money on the bottomry bond, charging the fact, to shew that the case intended to be made in support of the bottomry bond is not in fact such as to authorize the parties to raise money upon the bottomry bond. It forms no part of the plaintiffs' case; it is merely introduced in anticipation of the case that may be made by the defendants: it makes it therefore quite unnecessary for me to go into the facts of the case thus made. It is, therefore, simply the case of a bill for the purpose of setting aside a bottomry bond, on the ground of fraud, combination, and collusion to deprive the plaintiffs of their rights. Now, as to the evidence in the cause—the admissions which have been properly entered into on both sides, in order to save the expense of evidence,—the admissions on the part of the plaintiffs negative the case made by the bill in every part, so far as relates to the alleged fraud. The admissions, which must be taken to be the truth, shew that the case endeavoured to be made for the purpose of shewing fraud entirely fails. Now, under these circumstances, I should observe that Vice Chancellor Knight Bruce, on decreeing the cancellation of this bottomry bond, has not proceeded on any ground stated in the bill. The charges—I am not quite sure whether he referred to them—certainly form no part of the case made in the bill, which is the case of fraud, and turns entirely upon this—the ship was at Trieste and stayed there time enough to enable the captain to communicate with the owners in England, which it does not appear he did, for the purpose of obtaining supplies, in order to enable him to proceed upon the voyage; that therefore the captain was not in a situation to justify him in taking up money on the bottomry bond. Now, that is a ground which has no authority to support it. I asked repeatedly during the argument, if there was any case to be found in which that circumstance was considered to be sufficient to avoid a bottomry bond, and the counsel were

(2) 2 Robertson, 146.

unable to produce any case, or any case at all like it. But a case was produced which seemed to the contrary, but certainly no case at all supporting that proposition; and even if that proposition were capable of being supported, it would not support the decree, because it is no part of the case made by the bill that this bottomry bond is void because the captain, being at Trieste, did not send to England to obtain supplies in order to enable him to proceed on the voyage. That should have been a matter put in issue, so that the defendants might have had an opportunity of shewing why he did not; and the point to be settled between the parties would then have been, for the purpose of seeing how far that is to invalidate the bottomry bond. It is inconsistent, in fact, with the case of conspiracy: if there was a conspiracy, there would be no communication at all, and it would have been invalidated as in a general case of conspiracy. The case was put entirely on conspiracy and fraud together, and the proof of that particular case, as the result of conspiracy, is the ground of relief sought by the bill.

Now, if the case had stood there alone, I should be very much disposed to follow the rule which has been generally acted upon, and which is really founded upon justice, that where a case is brought forward on alleged fraud, and the fraud is disproved or not established, the Court will not admit such a bill to be used for any secondary purposes, because, the doors of this court being always open to allegations of fraud, there ought to be nothing to encourage the allegation; and whenever a fraud is imputed, and there is nothing in the evidence to support it, it would of itself be unjust, and much to be deprecated, that any encouragement should be given for trying an experiment to obtain relief on the allegation of fraud, which cannot be supported, and then for the party to be entitled to fall back upon the bill for some inferior kind of relief. But in this case,—and it is a very unfortunate case, because, after all, the amount in question is but a small amount,—I am afraid if I adopt that course I shall necessarily involve the parties in a new course of litigation. The effect of dismissing this bill would really be to leave the defendants to their remedy on the bottomry bond; but where the bottor is sought to be enforced, it then b question whether there is evidence circumstances were such as to ju raising of all the money that was se the bottomry bond: and althougl very strong reason to believe, fron letters written by the agent of the that the captain had no resources, not raise money so as to enable perform the voyage, otherwise tha bottomry bond, it is not in such a present as to justify the Court, with inquiry, in acting on the supposi the whole of the money raised on tomry bond was necessarily raise purposes of the voyage. That, would raise a new question bet parties, after all this expense in l and involve the parties in a new on the minor point, how far the bond for the whole sum raised wa not capable of being supported. T which I have come to—being very to avoid any further litigation, ar would be very much to the injury parties,—I throw it out for the p their consideration whether they w avail themselves of this suit, which nearly closed, for nothing remai done in this suit but that wl been done by the Court in oth namely, an inquiry whether the stances were such as to justify money that was raised on this bond being raised. If the defen sist on having the bill dismiss involve themselves in a new l and open a new case on thes when they might have an inquir suit; and I should think it sirable to take advantage of this that purpose. The result of that and these proceedings will not at fere with what the defendants are to in this suit, namely, to have in s the bill dismissed, with costs. If ties desire it, I will give them a tunity of considering the matter.

An inquiry was afterwards orde the defendants' request, the plain consenting.

V.C.
une 31. } CARPENTER *v.* BOTT.

Legacy — Next-of-Kin of a particular urname—Change of Name by Marriage.

A testator gave the sum of 5,000l., after e decease of his niece, to be divided among s next-of-kin of the surname of Crump ho should be living at the death of his said ece:—Held, that the wife of the plaintiff, ho was the next-of-kin of the testator, and hose maiden name was Crump, but who d married the plaintiff before the death of e niece, was entitled under this clause.

The question in this case was raised der the will of Thomas Crump, dated e 16th of May 1795, by which the tes- or, after giving certain pecuniary and ecific legacies, gave and bequeathed the idue of his leasehold and personal ates to his trustees, upon trust, after the cease of his wife, Elizabeth Crump, to se the sum of 5,000*l.*, and invest the me upon real or government securities, d to pay two fifth parts of the interest, vidends, and annual produce thereof, unto brother, L. Crump, for life; and as to e remaining three fifth parts of the said vidends and interest thereof, the said tes- or directed his trustees to pay and apply e whole, or so much thereof as they should nk fit, for the education of his niece, nne Maclean, then Sarah Price, during r minority, or until her marriage, and the rplus to accumulate for her benefit; and, on her attaining twenty-one, or upon her arriage, then, upon trust, to pay to his id niece, during her life, the said three fth parts of the said interest and dividends uring the life of his brother L. Crump, and from and after his decease, the whole yearly interest and dividends thereof, as the same should become payable. The tes- tator then continued in the following terms: "and in case my said niece shall not live to attain the age of twenty-one years or mar- riage, or shall die without leaving lawful issue of her body living at her decease, or if living, all such issue should die before attaining the age of twenty-one years if sons, or the like age or marriage if daugh- ters, then my will is, and I do hereby direct that four equal fifth parts of the said last-mentioned trust funds or securities shall belong to, and be divisible and divided among my next-of-kin of the sur- name of Crump, who shall be living at the time of the decease of my said niece, if then leaving no issue living as aforesaid, or, if leaving issue then living, at the time of the decease of the surviving or only child, if dying before attaining the age of twenty- one years or marriage, in like manner, as if my said next-of-kin had become entitled thereto under the statute for the distribution of intestates' personal estates." The testator gave the residue of his property to his brother L. Crump, his executors and admi- nistrators. The bill was filed for the ad- ministration of the estate of the testator, Thomas Crump; and a reference was made to the Master to inquire and state, amongst other things, who were the next-of-kin of the testator Thomas Crump, of the surname of Crump, living at the time of the death of Dame S. Maclean, the testator's niece.

The Master, by his report, found that Han- nah Carpenter, the wife of the plaintiff T. Carpenter, was the sole next-of-kin *ex parte paternâ* of the said testator living at the decease of the said Dame S. Maclean, and that being the daughter of Charles Crump and Jane Parry, she was of and bore the surname of Crump at the time of the death of the said testator, and until her marriage with the plaintiff, and that she had, accord- ing to the usage in England, since borne the surname of her husband, and still continued to bear such name; and the Master found that no evidence had been laid before him to shew who were the testator's next-of-kin *ex parte maternâ* of the surname of Crump; and, save as aforesaid, evidence had not been laid before him to shew who were the said testator's next-of-kin of the surname of Crump living at the time of the death of the said Dame S. Maclean, and therefore he was unable to find who were or was such next-of-kin.

The cause now came on upon exceptions to the Master's report; and the only question raised was, whether Hannah Carpenter was the testator's next-of-kin of the surname of Crump living at the time of the death of the said Dame S. Maclean, the testator's niece, within the meaning of the will.

It appeared that the said Hannah Carpenter married on the 21st of November 1816, and the tenant for life, Dame S. Maclean, died on the 12th of December 1845.

Mr. J. Parker and *Mr. Adams* appeared in support of the exceptions, and cited—

Pyot v. *Pyot*, 1 Ves. sen. 336.
Leigh v. *Leigh*, 15 Ves. 92.
Doe d. *Wright* v. *Plumptre*, 3 B. & Ald. 474.

Mr. Bethell and *Mr. Tripp*, for the Master's report.

The VICE CHANCELLOR.—The case of *Pyot* v. *Pyot* seems to me to be similar to the present. I find that in the report of the case of *Leigh* v. *Leigh*, before Lord Eldon, Baron Thompson, and Justice Lawrence, Justice Lawrence observed, that according to a manuscript note of the case of *Pyot* v. *Pyot* in his possession, the bequest was "to my nearest relation of the name," not "of Pyot," but "of the Pyots," which circumstance appeared to weigh with Lord Hardwicke in deciding that case (1). This may seem to explain Lord Eldon's assertion, in *Leigh* v. *Leigh*, that the name stands for the stock. In the case of *Pyot* v. *Pyot* the devise was in trust for the nearest relation "of the Pyots," and this was held to be *nomen collectivum* and descriptive of that particular stock. In that case it was also held, that a change of the name of Pyot by marriage did not exclude a party from taking. The only question here is, whether this expression "of the surname of Crump" shall be taken as equivalent to the fair construction to be put upon the case of *Pyot* v. *Pyot*: that is an express decision, and though the case was rather a singular one, yet I think it is evident what was the true meaning according to Lord Hardwicke's decision. I must consequently follow that case, and decide that Hannah Carpenter takes under the words of the will as the testator's next-of-kin of the surname of Crump.

(1) See "Pyot v. Pyot" in Belt's Supplement to Ves. sen. p. 161, in which it is stated that the words were not as in the report "of the name" of the Pyots, but merely "of the Pyots."

K. BRUCE, V.C. July 5, 10. } REYNOLDS v.

Legacy — Construction — Des
Legatee.

A testator who was a farmer, b
gave a legacy in these terms: "
one of my farming men." At the
testator's will, and at the time of
he had two persons in his serv
W. R.—one of them was a far
and the other was employed both i
and in the farm:—Held, (upon
dence that the testator intended to
latter,) that the latter and not t
was entitled to the legacy.

Augustine Luck, by his will, 25th of January 1836, made the bequest:—"I give and bequeath t Reynolds, one of my farming mer employ at the time of my deceas of 100*l.*" The testator died in 1836.

The testator, who was a farm his employ at the date of his w the time of his death, two pers name of William Reynolds; on the plaintiff, was a common farmi and the other, who was called "(performed a variety of functions person, house, and farm of the te

Soon after the testator's deat cutors, considering that "Old V the person intended by the test his legatee, paid him the legacy.

A suit was now instituted by t against the surviving executor of tor, for the payment of the legac given to William Reynolds.

Some evidence was entered in purpose of shewing that the testato the legacy for the person called "(It appeared that "Old Will" h the service of the testator and forty years, at the date of the wil that the testator had made a wil which was in part as follows:—' Richard Ainge, one of my farn 100*l.*, and to William Reynolds, my farming men, 50*l.*"; that in 18 the date of his second will, he tol that he had given "Old Will" that he should leave him 100*l.*

her evidence adduced sufficiently
ı the judgment.
ussell, for the plaintiff.
Vigram and *Mr. Wright*, for the
, the executor.

T BRUCE, V.C.—The question in
is, whether William Reynolds, the
is the person to whom a legacy is
the will of Augustine Luck, in
rds: "To William Reynolds, one
ming men, if in my employ at the
ıy decease, a sum of 100*l.*" To
:y, the plaintiff's title would be
unexceptionable, but for the cir-
e that another man, also called
Reynolds, was also in the service
oyment of the testator at the time
vas made and at his death. By
William Reynolds the money was
nd, whether rightly or erroneously,
ıim by the executors—the truth
ıt it certainly would have been
ı consider him as the legatee, if
iff had never been in the testator's
r employment; assuming as I do
ɜ was not a third William Rey-

ıly question of any difficulty is, I
whether, at the time of the will
le, the William Reynolds, who is
plaintiff, was one of the testator's
men"; or a person to whom,
impropriety or inaccuracy, the
n of "one of his farming men"
actually applicable. If this ques-
t to be answered in the negative,
iff is, I think, entitled to a decree;
t to be answered in the affirmative,
r the evidence goes to shew that
ɣ was intended for the other Wil-
nolds, and not the plaintiff.
stator, a Northamptonshire gen-
who was, I think, a bachelor, or a
without family, seems to have been
:hose persons of unostentatious
ıo prefer the realities to the fancies
He farmed 200 or 300 acres of
more, wholly or partly his own.
oyed upon his farm eight or nine
nen, if not more, of whom Ainge,
d in his will as one of his farming
his overseer, or a kind of bailiff,
less high name. Mr. Luck's domestic establishment seems to have been frugal and rustic. He had only two female servants, one of them a kind of housekeeper. He seems not to have had a man or boy in his service or employment, except mere farm labourers, subject to the question, whether that description belongs to the person who has received the legacy or Ainge. This William Reynolds, who has received the legacy, was the only male person, besides the testator, who lived in the house. He seems to have been one of that very useful order of men, well known to some of our old dramatists, who, according to the custom which, perhaps more frequently formerly than at present, prevailed, as well here as everywhere else, in farming as in other households, turned their hands to anything; which class, however, especially since the practice of the division of labour, is fast disappearing. He was in some sense a household servant certainly—I do not collect that he waited at table; but he whetted the knives and cleaned the boots and shoes. I do not say or infer that he attended the dressing-room, if any, of Mr. Luck. Whether in respect of him the testator was a direct contributor to the revenue, or made himself so, does not appear; but I must believe (always speaking from that portion of the information concerning his manner of life which the materials before me afford) that, if he had been taxed with, I do not say taxed for, having a coachman, groom, gardener, footman, valet, or butler, he would have denied the charge; and yet that it would have been incorrect or improper for him to have described "Old Will" as, or that he was not in the habit of calling him, or that he might not honestly have called him, his groom, his gardener, his footman, his butler, his coachman, or his valet, I am far from sure; since, in the exercise of the functions belonging to a majority at least, if not every one, of such various departments of service, with their very diversified names, this manifold serving-man seems to have passed his time, so far as he was not employed in other ministrations, which in a minor degree were at least perfectly ample: for in the morning he milked the cows; he also milked the cows in the evening; he attended to them and the calves, he waited on the pigs;

and, in addition to all this, lent a hand occasionally in the rick-yard, or otherwise upon the farm. If then he was coachman, groom, and gardener, if he was valet, footman, and butler, why may he not also have been a farming man? To what other part of that description can the care of cows, calves, or pigs be treated as belonging—to say nothing of the rick-yard or occasional work otherwise on the farm yard? He boarded and generally lodged, it is true, in the testator's house; but that does not prove him not to be a "farming man." His wages were weekly wages, and, most certainly, during a considerable part of his life he was a farm labourer or a farm servant. Upon the whole of the evidence legitimately capable of being regarded upon the question, I am of opinion that the William Reynolds, who is not the plaintiff, was a person whom, at the time of the will being made, it was not improper or incorrect to designate or describe as one of the testator's "farming men." He was, in my opinion, a "farming man," and something, or rather in some things, more; but still a "farming man." I dismiss the bill, therefore, although without costs; for I do not consider the case is altogether free from difficulty.

V.C. July 15. } FENTIMAN *v.* FENTIMAN.

Legacy — Annuities—Share of Freehold Estate—Sale or Mortgage.

A testator directed his trustees to sell his personal estate, and after payment of his debts, &c., to invest the residue, and out of the produce thereof, or if need be, by the sale and conversion, from time to time, of a sufficient part of the principal, to pay two annuities; and he directed his trustees if occasion should be, from time to time, to pay out of the rents and profits of his freehold and copyhold estates so much of the annuities as his said personal trust estate should be insufficient for discharging. The personal estate being exhausted, and the annual rents of the real estate being insufficient to keep down the annuities,—it was held, that the arrears were to be raised by sale or mortgage.

The testator, John Fentiman, by his will, dated the 23rd of November 1836, bequeathed all his leasehold hereditaments and personal estate, upon trust, to be sold and converted into money, and after payment thereout of all his debts and funeral and testamentary expenses to invest the residue in the names of his trustees, who were, out of the annual produce thereof, or if need be, by the sale and conversion, from time to time, of a sufficient part of the said principal trust estate, yearly and every year during the natural life of his wife, Catharine Fentiman, to pay to her an annuity of 200*l.* And in the next place, by and out of the same annual produce, or if need be, by the sale and conversion, from time to time, of a sufficient part of his said principal trust estate, yearly and every year during the natural life of Mary Ann Hay, to pay to her a like annuity of 200*l.* And the said testator directed, that his said trustees should, if occasion should be, from time to time, during the continuance of the said annuities of 200*l.* and 200*l.*, or either of them, provide and pay by and out of the rents, issues, and profits of his freehold and copyhold estates, so much or such part or parts, if any, of the same annuities, or either of them, as his said personal trust estate should be insufficient for discharging. On further directions, it appeared that the personal estate was exhausted, and that the annual rents of the real estate were insufficient to keep down the annuities; and that 800*l.* was due for arrears of the annuities. The question was, whether the arrears could be raised by sale or mortgage.

Mr. James Parker and *Mr. Lewin*, for the plaintiff, the residuary devisee.

Mr. Shapter, for one annuitant.

Mr. De Gex, for another.

Mr. Bailey, for the trustees.

The case of *Foster* v. *Smith* (1) was cited.

The VICE CHANCELLOR held, that the arrears were to be raised by sale or mortgage.

(1) 1 Phillips, 629; s. c. 15 Law J. Rep. (N.S.) Chanc. 183.

V.C. } ABBEY v. HOWE.

Construction—Distribution of a pita, *or* per stirpes.

, by his will, gave a fund to rust, to pay the proceeds of it to and, after the death of A, to cipal money unto and equally and every the children of A. h should be living at the death he lawful issue of such of them then dead, share and share d, that this was a gift to the l issue of A. and B. per capita, stirpes.

Atkinson, by his will, dated the ember 1807, gave all his real ate to trustees on the usual and nversion and investment; and n to pay the interest, dividends, s of a moiety of such trust- s daughter Sarah Wiseman, for l, after her decease, to pay such l and every the children of his rs, Sarah Wiseman and Susan- vell, which should be living at his said daughter Sarah Wise- e lawful issue of such of them e then dead, share and share will then proceeded as follows: pon further trust, that they my s do and shall pay the inter- ds, and proceeds to arise from g moiety or half part of the al monies, when and as the ave become due and be received, d daughter S. Kettlewell, for he term of her natural life, and ter her decease, upon trust to remaining moiety or half part l principal money unto and ngst all and every the chil- aid daughters S. Wiseman and ll, which shall be living at the y said daughter S. Kettlewell, vful issue of such of them as dead, share and share alike."

tor died in 1808; Mrs. Wise- 1826; and, on her death, a he trust funds was distributed. s. Kettlewell died. Mrs. Ket- had eight children, and Mrs. leven children. Some of the children of Mrs. Wiseman and Mrs. Kettlewell had died in the lifetime of Mrs. Kettlewell, leaving children and grandchildren.

The suit was instituted by the acting trustees of the will of the testator, for the administration of the trust fund. The principal question in the cause was, whether this fund was to be distributed among the children and issue of Mrs. Kettlewell and Mrs. Wiseman, *per capita*, or *per stirpes*.

Mr. Stinton, for the plaintiffs.

Mr. Swanston, *Mr. Kennion*, *Mr. Bichner*, and *Mr. Greene*, for the other parties.

The following cases were cited:—

Booth v. *Vicars*, 1 Coll. 6; s. c. 13 Law J. Rep. (N.S.) Chanc. 147.
Flinn v. *Jenkins*, 1 Coll. 365.
Armstrong v. *Stockham*, 7 Jur. 230.

KNIGHT BRUCE, V.C. said, that the gift in the will was not "to all the children of S. Wiseman and S. Kettlewell living at the death of S. Kettlewell, *or* the lawful issue of such of them as shall be then dead." If so, he might have adopted the construction contended for, that the fund was to be distributed *per stirpes*. But the gift was "unto and equally amongst all and every the children of my said daughters S. Wiseman and S. Kettlewell which shall be living at the death of my said daughter S. Kettlewell, *and* the lawful issue of such of them as shall be then dead, share and share alike;" and he thought that he was bound to hold that to be a gift *per capita*.

K. BRUCE, V.C. July 21. } LANGHAM v. THE GREAT NORTHERN RAILWAY COMPANY.

Railway — Lands Clauses Consolidation Act—Injunction—Railway Company taking Land under 8 *Vict. c.* 18. *s.* 85.

The Great Northern Railway Company entered upon a piece of land required for the purposes of the railway, under the 85*th section of the Lands Clauses Consolidation Act. A motion was made on behalf of the owners of the land for an injunction on the following grounds: first, that the operations of the company would greatly alter the appearance of the ground; secondly, that the owners had been*

induced by the company to let the time when a mandamus might have been obtained for summoning a jury before the long vacation, expire; thirdly, that the surveyor appointed under the 85th section had been previously in the employment of the company, and, in that character, had valued the land; fourthly, that the sureties named in the bond were the solicitors to the company, and, in that character, were liable to pay very large sums of money in respect of similar bonds; fifthly, that the sureties were named by the company ex parte, *and without any communication with, or reference to, the plaintiffs:—Held, that none of these reasons afforded sufficient ground for granting the injunction.*

In this case the owners of the land were entitled to it as tenants in common, and they had throughout acted together by one solicitor, and were all plaintiffs in the suit. The condition of the bond was, that "if the company should on demand pay to the plaintiffs," jointly, &c. Held, that the bond was irregular in respect of making the money payable to the plaintiffs jointly.

Semble—*that the introduction of the words "on demand" rendered the bond irregular* (1).

Semble—*that the suit was irregular from the owners of the land being joined together as plaintiffs in the suit.*

A plaintiff is not entitled to move ex parte *after having served the defendant with subpœna.*

Mr. Bacon and *Mr. Pole* moved *ex parte* for a special injunction to restrain the Great Northern Railway Company from taking possession of a piece of land belonging to the plaintiffs.

Mr. Wigram, for the company, objected to the motion being heard *ex parte*. He stated that the plaintiffs had served the defendants with a subpœna, and contended that, on that ground, the motion could not be heard except upon notice. He cited *Perry* v. *Weller* (2).

K. Bruce, V.C. said that he considered himself bound by the decision.

Mr. Wigram then stated that the company were desirous of having the motion disposed of, and consented that it should go on.

(1) See upon this point the case of Poynder *v.* the Great Northern Railway Company, *post*, p. 444.
(2) 3 Russ. 519.

The following case was then stat
Court:—Three gentlemen of the
Langham, three of the plaintiffs in t
were entitled to three-fourths of a
land at Holloway, required for the p
of the railway; and two other ge
the other plaintiffs in the suit, wer
visees in trust with a power of sale,
to the other fourth part.

In January 1847 a notice was se
Messrs. Langham alone by the com
the effect that the land in question w
required by them. Upon this a
tion commenced between the comp
Messrs. Langham for the purchas
land. For this purpose the land wa
by a surveyor employed by Messrs
ham at 8,093*l.* The land was valued
Smith, a surveyor employed by th
pany, at 3,300*l.* only. In conseq
this difference all idea of a sale by
contract was abandoned.

On the 12th of April one notice wa
on all the plaintiffs, that the land w
required; and, on the 28th of M
notice was also served on all the pla
the intention of the company to cau
to be summoned for the purpose of
the amount of the purchase-money.
first notice served on all the plainti
acted together in the business thro
solicitor. On the 22nd and 23rd
letters were sent to the plaintiffs' sol
the effect that steps would promptly
for having the jury summoned and t
tion disposed of.

The plaintiffs might, in Trinit
have compelled the company by m
speedily to summon a jury, but, re
the assurances of the solicitors of t
pany as to a prompt settlement of th
tion, they took no steps during th
and the time when an applicatio
have been made to a court of com
expired.

By the 8th Vict. c. 18. s. 85. (th
Clauses Consolidation Act) it is
that "If the promoters of the und
shall be desirous of entering upon a
before an agreement shall have be
to for the purchase-money, it shall b
for the promoters of the underta
deposit in the Bank, by way of
such a sum as shall, by a surveyor a
by two Justices in the manner

before (3) provided, be determined to be the value of such lands, and also *to give to such party* a bond under the common seal of the promoters with two sufficient sureties, *to be approved of by two Justices, in case the parties differ*, in a penal sum equal to the sum so to be deposited, *conditioned for payment to such party*, or for deposit in the Bank for the benefit of the parties interested in such lands, of all such purchase-money or compensation as may be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest, &c.; and, upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon such lands, without having first paid the purchase-money or compensation."

By the 59th section it is enacted, that, upon application by the promoters of the undertaking to two Justices, such Justices shall nominate an able practical surveyor, and such surveyor shall determine the same accordingly, and shall annex to his valuation a declaration in writing, subscribed by him, of the correctness thereof.

In the month of June, while the company were giving assurances of a speedy settlement by means of a jury, they caused Mr. Smith, who had been before employed by them to value the lands in question, to be appointed by two Justices to be the surveyor under the 59th & 85th sections; and Mr. Smith made the declaration required by the act that the value was 3,300*l.*, the price at which he had before valued them. They then paid into the Bank the sum of 3,300*l.* in one sum, and tendered to the plaintiffs a bond for the like amount, with two sureties. These sureties were the solicitors to the company, who, as sureties in similar bonds already given to owners on the line, were answerable for a very large sum of money. These sureties were put in by the company without any communication with the plaintiffs. The condition of the bond so given was, that if the company, &c., should, on demand, pay, or cause to be paid, to the plaintiffs (naming them), heirs, executors, administrators, or assigns, or should deposit in the Bank of England the amount of the purchase-money and compensation, &c.—that is, the money was made payable on demand; was made payable to the plaintiffs jointly; and the word "their," which ought to have come between the names of the plaintiffs and the word "heirs" was omitted.

According to the scheme of the company an embankment was to be made on the land, and the operations of the company on it would very much alter the appearance of it, and it would be very likely (in the opinion of the plaintiffs' witnesses) that, in consequence of the alterations, a jury, not being able to view the land in the present condition, would assess a much less sum to the plaintiffs than they were entitled to.

Mr. Bacon and *Mr. Pole*, for the plaintiffs.—The plaintiffs are entitled to an injunction on the following grounds:—First, although the act gives the company power to enter upon lands before an agreement for sale, yet, in such a case as this, where the character of the ground will be materially altered by the operations of the company, and where the company, by their method of dealing with the plaintiffs, have induced them to suffer the time to expire when a mandamus could be obtained to compel a speedy determination by means of a jury, it is within the province of a court of equity to restrain the company from entering. A court of equity has the power of preventing an inequitable exercise of the powers given by the act. Secondly, the surveyor, who has valued the lands under the 85th section, has been improperly appointed. Such surveyor ought to be impartial; but how could impartiality be expected from a person who had been previously employed by the company in the matter as their valuer, and who, being in their employment, had already valued the land? Thirdly, the sureties are plainly insufficient. They are, as obligees in similar bonds, liable to pay sums to a vast amount. Fourthly, these sureties are not sureties within the act. The whole transaction as to the bond has been done *ex parte*, and without any communication with the plaintiffs. The act contemplates that the sureties should be submitted to the approval of the plaintiffs, and

(3) By the 59th section stated *infra*.

that the plaintiffs should be at liberty to state their objections before the Justices. Fifthly, the bond given is not within the meaning of the act. The condition of the bond is, that if the company should pay "on demand." It ought to be made payable at once, without requiring any demand. The plaintiffs ought not, in any action which may be brought on the bond, to be put to prove a previous demand. Again, the condition of the bond is, if the company shall pay to the five plaintiffs jointly; whereas their interests in the lands are several, and the money ought not to be treated as one sum, but split according to the interests of the plaintiffs.

With reference to the fourth point as to the appointment of the sureties *ex parte*, Mr. Wigram mentioned the case of *Bridges* v. *the Wilts, Somerset and Weymouth Railway Company* (4), but did not argue the question.

Knight Bruce, V.C. (during the argument and at the close of the plaintiffs' argument) said, that, as to the first point made by the plaintiffs, the act gave the company the power of entering on the land on certain conditions. There was not anything in this case to induce him to restrain the exercise of those powers, if the conditions required by the act were performed. As to the second point, he did not like the appointment of Mr. Smith as surveyor under the act, and that the company ought not to have appointed their own surveyor: he thought, however, that he could not judicially interfere on that account. As to the third point, the insufficiency of the sureties, he did not see any ground for his interference. As to the fourth point, the appointment of the sureties *ex parte*, he should not depart from the decision cited, and he thought that he ought to follow it. His impression, however, was the other way—he must, however, add that he had not considered the point maturely, and had not heard counsel on the other side, so that his impression must go for nothing. He, however, decided the point on the authority cited, and without reference to his own opinion on it. The only question left, and on which he required to hear counsel for the company, was as to the su the bond.

Mr. Wigram contended, tha was within the 85th section; th "such party" mentioned in th the owners, and that had the the purchase-money payable in way, it would have been open as not being within the act.

Knight Bruce, V.C.—This having been *ex parte*, it was upon the company to be stri and regular in their proceedings. me that this bond is not strictly regular. Supposing that the tr as there was a treaty, had not ducted by all the tenants in com together as one person, and carr claim, I should have felt muc culty upon the point than I difficulty as to this bond aris manner in which the parties them acted together in this suit. Sti they did so act together, this apprehend, give a licence to company to deal with the purc to be paid for each share, or rights of each, in an irregular ma assuming, that the manner in have conducted themselves, act solicitor, would have justified excusable for the present purpo given to all, it is a different que ther the money that has been p Bank should have been paid in the joint account of all; and al the condition of the bond shoul words: "do and shall, on de and truly pay or cause to be p (naming the plaintiffs), treating ly, or do and shall deposit in tl amount of all such purchas compensation. It strikes me tl irregular, and that the manner i owners of the land have acted toge preclude them wholly and in from taking this objection. Th misrepresented their title, nor inferred that the railway compar rant of it; for the three gentle Langham were mentioned in t tice, and then there were added, quent notice, the names of the another gentleman. I think, th the bond is irregular, notwith

(4) *Ante*, p. 335.

that has taken place, and notwithstanding the form of the suit. I say this independently of the observation which I am about to make, founded upon the words "on demand," which occur, I think, twice. I would rather not give a conclusive opinion now upon that point; but the present inclination of my mind is, that it may tend to create a difficulty which was not intended. I rather think that it ought to be taken as the intention of the legislature that that which was directed to be done should be done at the first moment that it could be done, and of the mere motion of the company, without any demand. If so, the bond is wrong also in that respect. There is a slight omission in the bond too, which, perhaps, would not be noticeable but for the peculiar state of the title. It is merely a slip of the pen, and it occurs in the condition. "Now the condition of the above-written bond or obligation is, that the above bounden company, &c. do and shall on demand well and truly cause to be paid to the said plaintiffs [naming them], heirs, executors, administrators, and assigns, omitting the word "their." Now, if they were clearly entitled jointly, and there were no difficulty or doubt about the title, I am disposed to think, and I believe there is some authority for it at law, that I ought to treat the omission of that word as immaterial. I am not satisfied in this particular case that the omission, although merely accidental, is immaterial. I do not, however, give any opinion upon the insufficiency of the bond upon that ground.

I doubt very much whether the bill is in a proper form—whether, these parties being tenants in common, there is not a misjoinder. However, I do not apprehend that at this stage of the cause, there not being any plea or demurrer, the Court is bound to take any advantage of it. The insufficiency of the bond is the ground I go upon. Notwithstanding my view of the bond I do not know that the Court is positively bound to grant the injunction. I am of opinion that the bond is insufficient; therefore, that the condition precedent to the right of entry has not been performed.

By an arrangement between the parties, it was agreed that the company should not take possession of the land until the expiration of five days, and should not enter upon the land after that time until they had lodged a warrant for the summoning a jury; the company undertaking, after having lodged such warrant, to prosecute it with due diligence.

V.C. July 19. } FLINT *v.* WARREN.

Legacy—Charity—Uncertainty.

A testatrix gave unto, and to the use and benefit of, the several in-brothers and in-sisters for the time being resident in the several hospitals of or in the vicinity of Canterbury, a yearly sum of 5l.:—Held, that the bequest was void for uncertainty.

Mary Braddon, the testatrix in this cause, by her will, dated the 6th of March 1834, after giving various legacies and annuities therein specified, made the following bequest:—"And I also give and bequeath unto and to the use and benefit of the several in-brothers and in-sisters for the time being actually and *bonâ fide* resident in the several hospitals of or in the vicinity of the city of Canterbury, whose present yearly income to each such in-brother and in-sister does not exceed the sum of 25*l.*, an augmentation or yearly income of the sum of 5*l.*, to the use of every in-brother and in-sister for ever." And the testatrix directed her executors to pay to or invest in the names of the governors, masters, trustees, or acting patrons of the said several hospitals a sum of lawful money equal to meet such yearly augmentation; and that the non-resident in-brothers and in-sisters during such non-residence should forfeit their proportion of such augmentation, and such forfeitures and forfeiture should from time to time be paid over to the then resident in-brothers and in-sisters, in equal shares.

This cause was instituted for the administration of the estate of the testatrix; and a question was raised upon further directions, whether the bequest under this clause was void for uncertainty; or, if not, what charities were intended to be benefited by the testatrix. By the report of the Master, it appeared that there were twelve hospitals in the vicinity of Canterbury, but that there

were only six of such hospitals in which there were in-brothers and in-sisters answering to the description in the will, and whose income did not exceed 25*l.* per annum.

Mr. J. Parker and *Mr. Spurrier* appeared for the plaintiffs; and

Mr. Bethell, Mr. Chandless, Mr. Twiss, Mr. C. P. Cooper, and *Mr. Lewis,* for other parties.

The following cases were cited:—

Chapman v. *Brown,* 6 Ves. 404.
Attorney General v. *Sibthorp,* 2 Russ. & Myl. 107.

The Vice Chancellor.—I see that a direction was made to the Master without prejudice to any question in the cause, to inquire what hospitals there were of or in the vicinity of the city of Canterbury. From the beginning of the argument this has struck me, which appears to be an insuperable difficulty, that there is no sum appropriated to be given, but the amount is to be paid over to the governors of the hospitals, from time to time. It seems to me, that I cannot make sense of the bequest in any manner. Independently of the question that may be raised as to which of the hospitals of or in the vicinity of Canterbury the testatrix intended to benefit, there is extreme uncertainty in the words, "the several hospitals of or in the vicinity of the city of Canterbury." I cannot see that there is any precise meaning to that expression; nothing is pointed out by which the "vicinity" can be measured. Besides that substratum of difficulty as to where the in-brothers and in-sisters are to be found, I do not know what the testatrix meant by the expression "unto and to the use and benefit of the several in-brothers and in-sisters for the time being actually and *bonâ fide* resident." She does not appear to have intended those resident therein at the time of her death, but she meant to benefit the in-brothers and in-sisters for the time being resident, and yet she seems to have constructed her words so as to make it appear that those who were not resident might take, for she says, that the non-resident in-brothers and in-sisters are to forfeit their shares during their non-residence. How that could be without their originally having a right to share in the benefit I do understand. I feel myself quite incomp to decide what the testatrix really mean seems to me reasonably plain that no could fix a meaning to this will so a state what sum ought to be appropri Under these circumstances, I can onl cide that the gift is void for uncertaint

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V.C. June 12. } JOHNSON *v.* TUCKER.

Pleading—Notice of Replication.

The plaintiff having filed a replicat neglected to give notice thereof to the de dant, until thirty-five days afterwards. replication was ordered to be taken off file, and the plaintiff to pay the costs of application for that purpose.

This was a motion that service of notice of replication in the cause migh set aside for irregularity, the said rep tion having been filed on the 11th da March last, and the said notice the served on Mr. Boyle, the solicitor for defendant, on the 15th day of April; that the said replication might be take the file, and that the plaintiff migh ordered to pay the costs of the applicat

Mr. Bethell and *Mr. Rogers,* in sup of the motion, contended that the replica must be treated as a nullity, and take the file. By the 23rd Order of Oct 1842 (1), it was directed "that when solicitor or party shall cause an appear to be entered, or an answer, demurrer, or replication to be filed, he shall, on same day, give notice thereof to the citor of the adverse party, or to the adv party himself if he acts in person." It evident that notice of the replication o to have been immediately given, other the defendant would be deprived of his rights. The time of filing replication made the period from which all the o steps in the cause were calculated. It not for the defendant to inquire at time the replication was filed, but it wa duty of the plaintiff to give the defen

(1) Ord. Can. 216; 12 Law J. Rep. (Chanc. 4.

notice on the same day. In this case thirty-five days were allowed to elapse before notice was given to the defendant; consequently the defendant would have but twenty-five days left for examining his witnesses. The object of the Order was thus perverted by the plaintiff's own act. The Court had no alternative now but to order the replication to be taken off the file, and that the irregular service should go for nothing. The plaintiff might as well have allowed the two months to elapse, and then publication would have passed as a matter of course, and the defendant would have been entirely prevented from taking any proceedings. The following cases were cited:—

Johnson v. *Barnes*, *ante*, p. 173.
Matthews v. *Chichester*, 5 Hare, 207; s. c. *ante*, p. 160.

Mr. J. Parker and *Mr. Glasse*, contrà, urged that the Court could have no power to order the replication to be taken off the file; it was originally given within the period pointed out by the Orders, and was, therefore, regular at that time. By the 93rd Order of 1845 (2) it was directed that the parties should not proceed to examine witnesses until after the notice of replication; and if the plaintiff had taken his next step before the expiration of two months from the time of giving notice of the replication, the defendant might have complained, but he had no right to ask the Court to take the replication off the file. He might have applied to the Master for further time to examine witnesses, and this would have been immediately granted, and probably the plaintiff would have had to pay the costs of such application being rendered necessary. If the replication and notice thereof were one proceeding it might be different; but the replication must continue a replication whether notice of it was given or not; and the Court could not say that it was irregular merely because a subsequent step was not taken.

The Vice Chancellor.—I do not recollect that a case similar to this has ever come before me. It is a very remarkable application. The effect of the conduct adopted by the plaintiff is, that the defendant might be obliged to take a course of proceeding which, by the Orders of the Court, would not have been thrust upon him if the plaintiff had acted properly. The replication must be taken off the file, and the plaintiff must pay the costs.

(2) Ord. Can. 319; 14 Law J. Rep. (N.S.) Chanc. 293.

V.C. June 16. } DRUCE *v.* DENISON.

Fund in Court—Prerogative Administration.

Upon petition for the payment out of court of a sum of money, by the next-of-kin of a testator, who could only produce administration taken out in the Consistorial Court of London, it was held, that probate from the Prerogative Court of Canterbury was necessary.

By a decree in this cause, which was instituted for the administration of the estate of a testator, named Samuel Denison, it was declared that, upon the death of Lucy Denison, the wife of the testator, one moiety of his personal estate (which consisted of a sum of money in the 3*l.* per cent. consols, and another sum of money invested in South Sea annuities) should go to the next-of-kin of the testator.

Lucy Denison died in 1846; and a petition was now presented by one of the next-of-kin of the testator, praying that the share to which she was entitled might be transferred into her name. The petition set forth various letters of administration which had been granted to the persons through whom the petitioner claimed, all of which had been granted by the Consistory Court of the Bishop of London; and a question was now raised, whether the Court could order the money to be paid without probate having been taken out in the Court of the Archbishop of Canterbury.

Mr. Shapter, in support of the petition, urged that, for the purpose of having money paid out of court, it was sufficient to have administration in the Consistorial Court of the Bishop of London, and that, although it was the usual course to obtain a prerogative administration, there was no case which decided that this was absolutely

necessary, and it was well known that the Bank of England was in the habit of transferring stock upon administration being taken out of the Consistorial Court.

The following authorities were cited in support of the petition:—

Challnor v. *Murhall*, 6 Ves. 118.
Thomas v. *Davies*, 12 Ibid. 417.
Docker v. *Horner*, 3 Bro. C.C. 240.
Ex parte Horne, 7 B. & C. 632.
Scaith v. *the Bishop of London*, 1 Hagg. Ec. Rep. 625.
1 *Williams on Executors*, 229.
Young v. *Elworthy*, 1 Myl. & K. 215.
1 *Dan. Chanc. Prac.* 2nd edit. 304.

The VICE CHANCELLOR said the application was contrary to the usual practice of the Court, and he should therefore decline to make the order; but he thought it would be desirable to apply to the Lord Chancellor upon the subject.

L.C. July 27. } POYNDER *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Railway—Lands Clauses Consolidation Act—Bond for securing Payment of Purchase-money.

A railway company took possession of land under the 85th section of the Lands Clauses Consolidation Act, and gave a bond conditioned to be void if they should "on demand" pay to the plaintiff, or should "on demand" deposit in the Bank of England, the amount of the purchase-money :—Held, that the condition of the bond was not in accordance with the directions of the act; and the company were restrained from taking the land until they had given a bond in conformity with the provisions of the act.

The plaintiff was the owner of certain lands at Holloway, in the parish of Islington, which were required by the Great Northern Railway Company, for the purposes of their act. The surveyors of the respective parties not being able to agree as to the value of the land, the company proceeded under the powers contained in the Lands Clauses Consolidation Act, 8 Vict. c. 18. s. 85. A surveyor having been appointed under the provisions of the company paid the amount of hi tion into the Bank, and tenderec plaintiff a bond for the payment and thereupon entered into possessi land. The condition of the bond pressed to be "that such bond shall if the said company and the said [t ties,] or any of them, do and shall o well and truly pay or cause to be the plaintiff, his executors, admini or assigns, or do and shall o deposit in the Bank of England, u provisions of the said Lands Claus solidation Act, 1845, the amount of purchase-money or compensation in the manner provided by the sai Clauses Consolidation Act, 1845, b mined to be payable by the said c in respect of the said lands here mentioned, together with interest after the rate of 5*l.* per cent. per from the time of entering upon su until such purchase or compensatio shall be paid or deposited as here mentioned."

The plaintiff objected to this bo several grounds. One objection the bond was to be void upon p either into the Bank or to the pla the option of the obligors; whe plaintiff, alleging that he was own simple in possession of the lands, that whatever money might become in respect thereof would be payabl plaintiff himself, and would not be into the Bank. Another objection the bond made it incumbent on the to make a strict technical legal de the payment of the money before t could be put in force; whereas the insisted that he ought to be entitle force the bond without the necessit previous demand of the payment money.

The plaintiff then filed his bill, an injunction to restrain the compa making the railway over his lands, continuing any longer in possession the plaintiff offering, upon the in being made perpetual, to deliver up to be cancelled, and to do all such might be necessary to relinquish he might have to the amount paid Bank.

A motion for an injunction having been de to the Vice Chancellor of England, his nour granted the application.

The company now applied to the Lord ncellor to dissolve the injunction.

Mr. Bethell and *Mr. Craig* appeared for plaintiff.

Mr. Rolt and *Mr. Denison*, for the company.

The LORD CHANCELLOR was of opinion t the condition of the bond would not isfy the provisions of the act; that the intiff might compel the company to pay the purchase-money, although he had title, which could not be the intention of act.

The injunction must be continued till the pany give a proper bond in conformity h the act.

M.R. ne 7, 8; ly 29. } SMITH *v.* THE EARL OF EFFINGHAM.

Supplemental Bill — Pleading — Bill, tention of, for Twelve Months—Proceedgs at Law—Outstanding Terms—Supplemtal Bill where irregular.

Where the Court retains a bill for twelve nths, with liberty for the plaintiff to oceed at law to recover a moiety of certain eehold estates, which he had been prevented m recovering at law under an elegit, *in nsequence of outstanding terms of years, d restrains the defendants from setting up ch terms, or pleading the Statute of Limitions, it is irregular for the plaintiff, on a partial failure of the proceedings at w, to file a supplemental bill to bring the cts which had transpired subsequent to the aring before the Court, with a view to obin a further and more extended relief.*

The Court, by its decree at the hearing, tained the bill for a year, and gave the aintiffs leave to bring an action for the covery of a moiety of certain freehold tates, which they claimed by virtue of an egit, and it restrained the defendants from tting up outstanding terms of years, and lso from setting up the Statute of Limitations, hough this was not specifically asked by the bill. Under this decree, the plaintiffs brought an action of ejectment against the receiver of the estates, who was a party to the suit, and against the tenants who were no parties to the suit. One of the plaintiffs died, and the survivor obtained a verdict against the receiver, but the tenants of the estate, who were no parties to the suit, set up the outstanding terms, and also pleaded the Statute of Limitations, and obtained a verdict. The surviving plaintiff then filed a supplemental bill, and bill of revivor, and stated the whole of the proceedings at law, and asked for more extensive relief than he was considered entitled to at the hearing:—Held, that the supplemental bill was irregular; and a decree was made dismissing so much of it as consisted of supplemental matter, with costs.

The original bill was filed by Mr. Smith and Mr. Dudgeon, claiming, on account of an annuity granted to Mr. Dudgeon, to be the first incumbrancer upon divers freehold estates of which Francis Ward Primrose was tenant for life. These estates were subject to two outstanding terms of years, the one for 500 years, and the other for 1,000 years.

On the 15th of November 1817, Mr. Primrose had granted to Mr. Dudgeon an annuity of 380*l.* for the life of the grantor, and entered into a covenant for payment of the same; he also executed a power of attorney under which, on the 15th of December 1817, judgment was signed at the suit of Mr. Dudgeon for 5,320*l.* and costs, and the docket was also entered. After this, Mr. Primrose created several further incumbrances upon the estates in favour of other persons.

Mr. Dudgeon's annuity was paid up to the 15th of November 1820; but on the 6th of November 1822, it having fallen into arrear, Mr. Dudgeon caused a writ of *elegit* to be issued upon his judgment, and upon the finding of the jury the sheriff delivered a moiety of the estates to Mr. Dudgeon; and the inquisition having been duly returned, he commenced an action of ejectment to recover possession of a moiety of the land, but a *nolle prosequi* was subsequently entered in Hilary term, 1826, in consequence, as alleged, of the discovery that the outstanding terms of years preceded the estate of Mr. Primrose.

Mr. Dudgeon took no further steps to obtain payment of the annuity; but in November 1838, he, for a nominal conside-

ration, assigned it, with all arrears, to Mr. Smith; and on the 7th of March 1839, nearly nineteen years after the last payment of the annuity, they filed their bill against the whole of the incumbrancers, claiming a priority in respect of their security, notwithstanding the rights of all the subsequent incumbrancers had been declared in two other suits, of *Brown* v. *Howard* and *Brydges* v. *Howard*, to which the plaintiffs had not been made parties.

In these suits Gardiner Chapman was appointed the receiver, and he was to apply the rents in keeping down the incumbrances according to the priorities declared.

On the 6th of May 1844, upon the hearing of this cause, a decree was made directing that the plaintiffs' bill should be retained for twelve months, with liberty for the plaintiffs, or either of them, in the mean time to proceed at law touching the matters in question in the cause as they might be advised; and the defendants were restrained, by injunction, from setting up in their defence, against any such action, the outstanding terms in the pleadings mentioned, or either of them, and from pleading the Statute of Limitations.

The plaintiffs, in pursuance of the liberty reserved, brought an action of ejectment to recover possession of the lands to which they claimed to be entitled by virtue of the *elegit*, against Gardiner Chapman, who was in possession as receiver in the cause of *Brown* v. *Howard*, and who was a party to the suit, and against William Martin and others, who were the tenants in possession of the lands, and who were not parties to the suit.

On the 2nd of August 1844, the action was tried, at Norwich, when William Martin and others, the occupying tenants, who were not parties to the suit, insisted upon their right to set up the terms of years, and also claimed the benefit of the Statute of Limitations, and obtained a verdict in their favour; but the plaintiffs obtained a verdict against Gardiner Chapman, with liberty for him to move the Court of Exchequer of Pleas on objections taken by him and overruled by the Judge who tried the action.

On the 11th of November 1844, Gardiner Chapman applied to the Court of Exchequer for a new trial, and a rule *nisi* was made.

On the 7th of August 1844, pending the proceedings at law, Mr. Dudgeon (on the 7th of December 1844, b rule *nisi* was disposed of, Mr. S surviving plaintiff, filed his bill c and supplement, setting out the w ceedings in the action with the su applications to the Court, and pray the supplemental matter for so mu relief asked for by the original bi not waived at the hearing; that which had accrued due since th August 1844 might be accounted the plaintiff might be let into pos the lands in question, and that on trial of the action Gardiner Chapm be ordered to admit that the title Dudgeon accrued to him within years next before the commenceme action, and for other relief.

On the 19th of February 1845, the bill was filed, the rule *nisi* for a was discharged. The supplementa afterwards amended, and answers tained and evidence gone into.

On the 6th of July 1846, t Chancellor, upon appeal, affirmed t made by the Master of the Rolls, g plaintiff leave to bring his action at in this state the cause was set hearing, both upon the equity re the original suit, and also upon th mental bill.

Mr. Willcock and *Mr. Giffard* plaintiff.—The action of ejectmen only action the plaintiffs could bri the decree made on the former h this case—*Smith* v. *Earl of Effing* A legal impediment had arisen to at law, and by the present practi necessary to bring the facts subse the last hearing before the Court plemental bill, before any relief obtained.

Neate v. *the Duke of Marlbo* Myl. & Cr. 417.
Milner v. *Lord Harewood*, 17 V
Usborne v. *Baker*, 2 Mad. 379
Morris v. *Ellis*, 13 Sim. 1.
The Marquis of Waterford v. 3 Cl. & Fin. 270.
Pinkus v. *Peters*, 5 Beav. 253.
Holworthy v. *Mortlock*, 1 Cox

(1) 7 Beav. 357.

Davies v. *Williams*, 1 Sim. 5; s. c. 4 Law J. Rep. Chanc. 210.

Brown v. *Newall*, 2 Myl. & Cr. 558; s. c. 6 Law J. Rep. (N.S.) Chanc. 348.

nder this bill admissions have been obtained which could not otherwise have been got at. It was, however, said, that e application ought to have been made by tition; but as this objection was merely chnical, it should therefore have been taken fore the answers were put in.

Mr. Cooper and *Mr. Cooke*, for Robert own, the personal representative of William Brown, an incumbrancer for 600*l.* year.—The seisin of Mr. Primrose had ver been proved. The plaintiff at law as also bound to prove his title by an examined copy of the judgment roll shewing e judgment, the award of the *elegit*, and e return, and that the sheriff had set out a oiety of the lands by metes and bounds—*Starkie on Evidence*, tit. 'Ejectment,' 410, *Adams on Ejectment*, p. 32. He as also bound to shew that his right was ot barred by the Statute of Limitations, ot only against Gardiner Chapman but particular against the tenants on the tate, who were no parties to the suit, as e 3 & 4 Will. 4. c. 27. ss. 2. and 34. presented both land and rent being recovered ter the expiration of twenty years, after hich time the right was extinguished. It as, however, irregular and contrary to the ractice to bring before the Court by supplemental bill the facts which transpired at w. If the defence at law was contrary to e decree of this Court, and prevented the ial of the action in accordance with the rms of the decree, the plaintiff should have pplied by petition for the interference of is Court, so as to enable the court of law do justice.

2 *Dan. Chanc. Prac.* p. 766.

Holworthy v. *Mortlock*, 1 Cox, 141.

Bayley v. *Morris*, 4 Ves. 788, 794.

Mr. Kindersley and *Mr. Parry* appeared or John Jones Bateman and James William Smith.

Mr. Turner and *Mr. Kenyon*, for the Earl of Rosebery and William Harvey.—The present bill was supplemental to the first suit, and it sought to obtain relief different to that first asked; and though a part of the bill was to obtain a revivor of the suit, still it did not alter the case, and the whole ought to be taken off the file for irregularity —*Hodson* v. *Ball* (2).

Mr. Lovat appeared for the trustees of the terms of 500 years and 1,000 years, which they held for Mr. Brown.

Mr. Corrie appeared for James Henry Mann.

Mr. Willcock, in reply.

The MASTER OF THE ROLLS.—The original decree under which the action was brought has become the decree of the Lord Chancellor; and having been affirmed by him, it is, therefore, incapable of being altered here. The case comes on in a shape entirely different from any other with which I am acquainted. If at the hearing of a cause in equity, it appears that the plaintiffs have or may have some equity, which cannot be satisfactorily established, unless they first establish a legal right in a legal manner, the Court delays the decision upon the equity, until the legal right is established, and retains the bill for a limited period, in order that the plaintiff may, in the mean time, have an opportunity of establishing his right at law, giving at the same time such special directions as may be thought necessary, either for the purpose of removing the impediment to the trial of the legal right or saving expense by ordering the admission of undisputed facts. But subject to such directions, the plaintiff is to establish his right at law according to legal form; and this Court does not usually consider what passes at Nisi Prius, or interfere with the trial, or any of the incidents attending the trial. After the case is determined at law, the regular course is to set down the cause in equity to be heard, as it is said, on the equity reserved; and on the hearing the result of the proceeding at law is ordinarily held to be conclusive; no direction for a new trial is to be given here. The Court, however, does not reject or abandon all attention to the proceedings at law. On a proper application made for that purpose, shewing that the proceedings were such that the real question between the parties could not be tried, that the directions given by the Court were not obeyed, so that the

(2) 1 Phil. 177; s. c. 12 Law J. Rep. (N.S.) Chanc. 80.

verdict at law was obtained by means of a contempt of this Court, or that the decree, giving leave to bring the action, did not contain some direction, for want of which the question could not be tried in an action properly brought, the matter may then be considered. In some cases relief may be given by retaining the bill for a longer time, in order to allow a new legal proceeding to be brought. In other cases it may be necessary to re-hear the cause, for the purpose of procuring other directions to be inserted in the decree. In this case there has not been, and there is probably no ground for any application against anybody for disobedience to the directions contained in the decree; and there has been, except before the Lord Chancellor, no application for a re-hearing of the case to obtain directions different from those already given; but the plaintiff asks that he may now have a greater extent of relief than that which at the hearing of the cause, the Court thought him entitled to have before he established his right at law, which right is not yet established. Nothing affecting the equity as it appears in the cause, has occurred; and the plaintiff's claim in the supplemental bill is founded only on occurrences which took place at the trial, or on the motion for a new trial. The plaintiff, for the purpose of laying the right, brought an action of ejectment against persons who were not parties to the cause in equity. If, as he says, an action of ejectment was his only course of proceeding, and if that action could not be successfully prosecuted, the decree in that case was so far framed as to enable him to try the right in the manner intended. On the argument for a new trial, on Mr. Chapman's application, the plaintiff refused to consent to a new trial, although it was proposed to give the consent of the other defendants to the action who had obtained a verdict in their favour; and the consequence is, that he is left at present with a verdict against Gardiner Chapman, and in favour of the other defendants to the action. And all this seems to have happened before, or whilst the decree was under the consideration of the Lord Chancellor; the case appearing to be, that if the action of ejectment was right, as the plaintiff still alleges it to be, the decree did not sufficiently provide for the removal of impedi-

ments to the trial of the legal ri
tion; and the plaintiff, instead
a proper method of obtaining r
respect files this long supple
containing, amongst other mat
cannot help thinking improper
statement of the arguments of c
the observations of the learne
the application for a new trial.
tiff appears to me to have ver
taken his course. The legal
it was intended he should hav
tunity of trying, does not ap
been tried. Whether his own
I will not venture to say; and
appear to me his failure is a fo
which he can build a new equi
of such a supplemental bill
relief is to be obtained, I thin
had in a different form and ma
shall endeavour to leave the
him. Thinking the bill impr
dismiss it, with costs, except
consists of revivor on the death
I shall do that without preju
application or proceeding he ma
to make or adopt in the pecu
stances of the case.

The case upon the equity
directed to stand over.

V.C. July 3. } BALDWIN *v.* DAM

Bill—Dismissal of, for want
tion.

Upon motion to dismiss a bill
prosecution by a defendant, wh
his answer, it was objected by
that three out of the sixteen de
not yet answered the bill:—H
plaintiff not having used due
getting in the answers, the bill
missed, unless the plaintiff wou
to proceed immediately.

This suit was originally i
the purpose of obtaining an i
restrain the directors of the G
Railway Company from deal
sum of 21,000*l.* The injunct
fused.

Mr. Hubback now moved to dismiss the bill, for want of prosecution.

Mr. Welford opposed it, on the ground that all the answers had not been got in.—He stated that there were about sixteen defendants; and three or four had not answered. The reason no process had been issued, or steps taken to force them to answer was, that negotiations had been going on between them and the plaintiff. The case of *Arnold* v. *Arnold* (1) was cited.

The VICE CHANCELLOR.—Here the plaintiff has got in some of the answers; and then, instead of compelling the other defendants to answer, he goes on negotiating with them, and therefore wilfully delays the suit. I think it is a case for dismissing the bill.

An application was then made for further time to get in the answers; but the Vice Chancellor said he would not do so without the consent of the defendant. An order was then taken by consent for dismissing the bill, unless replication should be filed within three weeks.

V.C. May 25. L.C. May 28. V.C. June 9.

THE EXETER AND CREDITON RAILWAY COMPANY *v.* BULLER.

Railway Company—General Meeting of Shareholders—Controul over Directors—Power to file a Bill in the Name of a Corporation where the Directors keep possession of the Corporate Seal—Sale of Shares—Change in the Intentions and Views of the Company.

A majority of the shareholders in the Exeter and Crediton Railway Company passed a resolution in favour of leasing their railway to the Taw Vale Company, which was worked upon the narrow-gauge principle. A majority of the directors of the Exeter and Crediton Company (seven in number), being desirous of leasing the line to the Bristol and Exeter Company, upon the broad-gauge principle, refused to carry out the wishes of the company, and retained possession of the common seal. The minority of the directors (three in number), who concurred with the shareholders, filed a bill in the name of the company for an injunction against the seven directors, to restrain them from leasing the railway to the Bristol and Exeter Company, and from opening the line upon the broad gauge. The injunction was granted. Subsequently, the seven directors moved, in the name of the company, that the bill might be taken off the file. The Vice Chancellor directed the motion to stand over until the wishes of the shareholders should be distinctly ascertained at a general meeting; and the Lord Chancellor, upon appeal, confirmed this decision.

A motion was then made before the Vice Chancellor to dissolve the injunction, on the ground that the majority against the opening of the railway upon the broad-gauge principle had been obtained by an improper sale of shares to the South-Western Railway Company. The Court held, that it could not interfere to prevent the shareholders from disposing of their interest in any legal manner, although such transfer of interest might entirely change the original intention and prospects of the company; and that the injunction must consequently be continued to restrain any acts of the directors which should be inconsistent with the wishes of the majority of the shareholders.

In 1845 a company was incorporated for making a railway from Exeter to Crediton, in the county of Devon. Negotiations were subsequently entered into for the leasing of this line to the Bristol and Exeter Railway Company, which railway was worked upon the broad gauge; and other negotiations were entered into for the same purpose with the Taw Vale Railway and Dock Company, which latter railway was worked upon the narrow gauge. It appeared that a considerable majority of the shareholders in the Exeter and Crediton Railway were in favour of leasing their line to the Taw Vale Company; but it further appeared that a majority of seven out of the ten directors of the Exeter and Crediton Company were in favour of leasing the line to the Bristol and Exeter Company. Several general meetings of the shareholders were held, at which the question was agitated, and the seven

(1) 1 Phil. 805; s.c. *ante*, p. 236.

directors were in a minority; but being unwilling to carry into effect the resolutions passed at these meetings contrary to their wishes, they refused to allow the common seal of the company to be attached to any agreement for that object.

By a clause in the Railways Clauses Consolidation Act it was provided, that after any railway should have been opened upon either the broad or narrow guage, it should not be lawful subsequently to change the breadth of the gauge.

Under these circumstances, the three directors who were favourable to the lease being made to the Taw Vale Company filed their bill, in the name of the company, against the seven other directors, for an injunction, praying that the said seven directors might be restrained from entering into any agreement for opening, using, or working the said railway upon the broad gauge, and also from making any junction between the Exeter and Crediton Railway and the Bristol and Exeter Railway, and from leasing or selling the said Exeter and Crediton Railway to the Bristol and Exeter Railway Company, or to any other company working upon the broad gauge.

The motion was heard before the Vice Chancellor of England, on the 5th of April, and the Court granted the injunction.

On the 25th of May a motion was made on behalf of the company, but upon instructions given by the seven directors, that the bill might be taken off the file, upon the ground that no proper authority had been given for filing it.

Mr. Rolt, *Mr. Chandless* and *Mr. Follett*, appeared in support of the motion; and *Mr. Bethell*, *Mr. James Parker* and *Mr. Hardy* opposed it.

The Vice Chancellor directed the motion to stand over for two months, in order that a general meeting of the shareholders might be convened, and that it might be ascertained whether they sanctioned the institution of the suit.

The defendants renewed the application before the Lord Chancellor, by way of appeal.

Mr. Rolt, *Mr. Chandless* and *Mr. Follett*, for the motion.

Mr. Bethell, *Mr. James Parker* and *Mr. Hardy* appeared for the respondents, but were not called upon.

May 28.—The Lord Chancellor.—In this case the bill is filed in the name of a railway company, on behalf of the corporation. A motion is made by some persons, whoever they may be, assuming to be the corporation, in the name of the corporation, to disclaim the bill, and to have it taken off the file, as having been filed without their authority. This proceeding at once raises the question, which side is to be considered as the corporate body; and whether the directors are to be so considered, who are made defendants to this bill, and who say that they constitute the corporation also; for although they act as plaintiffs here, and are making this motion as the corporation, they are the same individuals against whom the parties assuming to act for the corporation are proceeding, and upon the bill they are the defendants, but they represent themselves also as being the corporation; they are moving to have a bill taken off the file, which is in substance filed against themselves.

Now, the first question will be, whether these parties are the corporation or not—whether they are authorized to act on behalf of the corporation, to represent the corporation, and to make this motion in their name. That would be a very material consideration, if I took a different view of the other part of the case; but the view I take of the other part of the case makes it unnecessary for me to express any opinion whether they are or are not at this moment entitled to represent the corporation. I mean the directors, because I find from the facts which are not disputed, that the position of the parties stands thus: they being directors originally constituted, and therefore being in that character entitled, as being a majority of the directors, to exercise the powers of the corporation, as far as the act authorizes them to do so—I find by the provisions of the general act (1), "that the exercise of all such powers shall be subject also to the controul and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any

(1) 8 & 9 Vict. c. 16. s. 90.

act done by the directors prior to any resolution passed by such general meeting." Now, that provision of the act forms a very important part of the consideration, with regard to the exercise of the functions of the executive body of all these corporations. It is specially provided for by the particular act. By the general law applying to all these cases, whatever power may be vested in the directors, they are subject to the controul of the general meeting. But then, acts done previously to a resolution of the general meeting, are not to be interfered with by the resolutions of that general meeting. It is quite obvious, therefore, according to the provisions of that enactment, that the power to controul the authority of the directors would, in many cases, where the directors were so minded to act against the wishes of their controuling body, the general body of the shareholders, be nugatory; because long before the parties could come here to ask the Court to interfere and to restrain the act of the directors, the directors may have done some act to the prejudice of the company, which, according to the provisions of the act, could not be interfered with by any thing done under the authority of a general meeting. Now, if an act is in contemplation, which the company at large wish to restrain, unless this Court adopt some such course as has been adopted in the present case, there would be no possibility of intervening in time to prevent a particular act from being done. As there can be no resolution without calling an extraordinary general meeting, it is quite clear that the directors would always have it in their power to complete the act before the interposition of the Court. Then applying these general observations to this particular case, I find an act contemplated by the directors disapproved of by at least a large proportion of the shareholders: how those parties became shareholders I have nothing to do with. I have nothing to do either with the Great Western Railway Company or the South-Western Railway Company, or whatever company it may be. I only find the directors of this particular company entering into an arrangement to do an act which is disapproved of by the body, which is sworn by the affidavits to be a large majority of the shareholders. One individual is stated to have proxies, which he had for the purpose of the particular meeting, amounting to 1,500 out of the whole number, being a majority. He had in his pocket, therefore, a majority of votes which might be used at that meeting to controul the acts of the directors.

The directors, contemplating this act, thought it necessary to adopt this course, about which I say nothing beyond what is necessary for the purpose of the present motion. The seal being with the secretary of the company (I speak from the affidavits) one of the directors, so minded to act against the wishes of the body, obtains possession of that seal from the secretary, for the purpose, as it is stated, of preventing the body at large from having the use of the seal, which, undoubtedly, if they represent the corporation, they had a right to the possession of, and to have at their disposal. He then gets the seal into his possession. Then comes a meeting on the 12th of April last; he himself presides; a resolution is passed against the views of himself and his co-directors, and a resolution is carried for a purpose opposed to what their wishes were. He has got the seal. He is applied to at the meeting for the seal, in order to carry into effect the resolutions which had been carried adverse to his intentions and wishes. He does not say that he refused it, but the affidavit says the seal was not produced; that it was in Mr. Buller's possession, but that it was not produced. After he quitted, another person took the chair, and then come the resolutions: the first resolution having passed unanimously, with the exception of one individual only holding up his hand against it, for all the other parties were in favour of it. Then the affidavit states—[His Lordship here read an affidavit of the directors who concurred with the shareholders, stating a resolution passed at the meeting in favour of leasing the line to the Taw Vale Railway and Dock Company, and for restraining the directors from opening the railway on the broad gauge, or from completing its connexion with the Bristol and Exeter railway].

Then the deponents further say, that by reason of the said J. W. Buller taking and retaining the seal of the company, it was impossible that they could give a retainer

to the solicitors to proceed in this suit under the common seal of the said company; but they did, as such directors, authorize them to file such bill and to proceed in the name of the Exeter and Crediton Railway Company. "I, Emanuel Cooper, say, that at such last-mentioned meeting of the 12th day of April, I held proxies from shareholders representing 1,500 votes, which 1,500 votes constituted a majority in themselves, exclusive of about twenty shareholders who attended personally, and voted at such meeting in favour of the resolution so carried as aforesaid. Say that immediately after the meeting held on the 31st day of March 1847, it was determined by us, on behalf of the said company, to file such bill to restrain the said defendants from acting, as we verily believe they intended to act, in direct opposition to the wishes of the shareholders. Say that on or about the 23rd day of April last, we severally received letters from Thomas Hartnoll, the secretary of the said company, calling a meeting of the directors of the company." That affidavit is not contradicted, therefore there is no doubt of the fact. I think that we are to assume that there is an all but unanimous wish on the part of the shareholders that that which is contemplated by the majority of the directors should not take place. And I find at the meeting resolutions carried, all but unanimously, for the purpose of so controuling the power of the directors. I find it expressly authorized by the general act that they should do so.

Then it is said, first of all, that there is no seal affixed to the authority for filing this bill; or, at all events, it is said, there has been no resolution in favour of filing this bill. Although there has been no resolution in favour of filing this bill in so many words, there are resolutions which could not be possibly carried into effect but by filing some bill of this description, the resolution being to restrain the directors from doing what they were about to do. Now, the resolution of the company at large might make what they were about to do illegal and invalid, but it could not restrain them. The interposition of legal authority is required for the purpose of restraining them from doing that which they contemplated doing. It can only be done by filing a bill praying for an injunction. It is impossible not to see that the filing of the bill was in direct conformity with the resolutions passed all but unanimously at the general meeting of the shareholders. The question is, when an application is made by defendants professing to represent, and possibly legally representing at the present moment, the corporation, if they still are directors, and therefore entitled to act until they are restrained, whether I am to give effect to the state of things as they stand at this moment, without giving the corporation the opportunity of saying whether they do or do not assent to the resolution passed at that general meeting, and are, therefore, prepared to authorize that which is necessary to carry it into effect. I think that would not only be full of difficulty and injustice, but it amounts to absurdity. Where I find the interests of parties so complicated as they are in the present case, and the matter in contest between two parties who represent the corporation (for whoever represents the corporation is perfectly immaterial), if at the general meeting of the shareholders any resolution passes controuling the act of the directors, and if, at that general meeting, the shareholders had the power, by the general act, to controul, they would have the power of controuling that which may be said to have been already done: but the question is as to carrying one of their resolutions into legal effect. Beyond all doubt the shareholders would have the power, if a majority concur in authorizing the proceeding, of putting the bill on the file; and the reason why the proceeding presents some feature of irregularity at present I cannot but attribute to the act of the defendants themselves: they having withheld from the general meeting the use of that seal, which, if it had been there, they might have used and avoided all difficulty.

Under these circumstances, I am called on to take this bill off the file, on the ground of its not being sanctioned by the corporation. I want to know whether it is now sanctioned; whether it was previously sanctioned by the corporation before the bill was filed is not material, if the corporation, being informed of what has been done, think proper to sanction and adopt it. They could not sanction and adopt it hitherto, because they had not the seal which had been withdrawn by the directors from the original custody

secretary, obviously for the purpose enting the company from doing what tended to do. The Vice Chancellor, e, said, I will let it stand over in at I may know the state of circum- which must exist before I can order l to be taken off the file, namely, r this proceeding be or be not sanc- by the corporation, and he has let it ver for that purpose. He has made er order. I think that is for the of the company, and would be doing between these parties who have a come to this court, representing the of the corporation. It seems to een a matter of arrangement as to tween the parties, otherwise I should ought two months a very long time; have no application before me, as I and it, to vary the order in that . I think the order is right in every and the motion must, therefore, be , with costs.

9.—A motion was now made before e Chancellor of England, on behalf lefendants, that the injunction might olved.

Rolt, Mr. Chandless and *Mr. Fol-* support of the motion, contended original intention of the legislature, he act was passed for making the and Crediton Railway, was, that ectors should have power to lease e, or form an amalgamation with the and Exeter Railway; and for this e a clause empowering the direc- make such lease was inserted in the at the object of the legislature evi- was to have a continuous broad- line, and the original shareholders l into the speculation with the view ing a communication not only with and London, but also with Bristol e country let in through the Great n line. With this object the directors company had carried on negotiations he Bristol and Exeter Railway Com- and upon the very eve of the open- the railway upon the broad-gauge le, the shareholders commenced an ion to these proceedings. The chief in this opposition had been the n and South-Western Railway Com- who had found means of purchasing up the greater part of the shares in the Exeter and Crediton Company, and had thereby obtained a majority amongst the shareholders. Their object in obtaining this injunction had been to restrain the opening of the railway upon the broad gauge, since there was a provision in the Railways Clauses Consolidation Act, which prohibited a company from altering the gauge upon which a railway had once been opened. It was contended, under these circumstances, that the Court ought not to interfere by injunction to restrain the directors from opening the railway, for otherwise the South-Western Company, who had been dealing with the money of their shareholders in an unjustifiable manner, in purchasing up the shares, would have the power of defeating the intention of the legislature, and, by laying down a narrow gauge, would materially increase the expenses of the Exeter and Crediton Railway and injure their prospects.

Mr. Bethell, Mr. J. Parker and *Mr. Hardy*, appeared for the plaintiffs, and contended, that the injunction ought to be continued to restrain the opening of the railway upon the broad-gauge principle. The plaintiffs here represented by far the greater number of shareholders; and whether the shares had been purchased by the South-Western Railway Company, or their nominees, was a matter which the Court had nothing to do with. The shareholders had full right to sell their shares to any one who would buy them; and it was evident that the majority of the present shareholders were opposed to the lease being made to the Bristol and Exeter Railway. The directors were the servants of the shareholders, and their conduct was very properly under the controul of a general meeting of shareholders. This principle had been laid down by the Court upon the motion to take the bill off the file, and the Lord Chancellor had fully confirmed that decision. His Lordship had said the shareholders appeared to be almost unanimous in their desire that the proposed lease to the broad-gauge line should not take place, and that the acts of the directors must at all times be under the controul of the shareholders at a general meeting.

The Vice Chancellor. — I shall certainly continue the injunction. It appears

to me there is no clause in the act of parliament which forbids the shareholders in the Exeter and Crediton Railway from changing their plan as to any mode of conducting the affairs of the company, and there is consequently nothing to prevent the shareholders from coming to a resolution which would displace any sort of claim the Bristol and Exeter Railway Company might have for an amalgamation with the Exeter and Crediton Railway. The shareholders, at a general meeting, resolved that the lease to the Bristol and Exeter Railway Company should not be carried out, but that an agreement should be entered into for the purpose of leasing the Exeter and Crediton Railway to the Taw Vale Company. This plan was objected to by the directors, and the bill was filed on the allegation that the directors were going to do something which was inconsistent with the wishes of the shareholders. It has been said that the shareholders have changed their views, but they have a perfect right to do so. It has very often happened that great expenses have been incurred by similar changes in other companies. I can myself recollect one case in particular of this sort; and it is evident that there might in every company be a change of schemes carried out with the greatest propriety that might be productive of great expenses. It has also been said that these changes have been resolved upon by persons who were not originally shareholders; but it is quite clear that there is nothing in the act of parliament to prevent the shareholders from disposing of their property to any one who will purchase them; and after the regular steps have been taken for registering the shares the purchasers have the same rights as if they had been original shareholders.

The next point made was, that the shares have been purchased with money supplied by the South-Western Railway Company, who had no right so to apply their money. I do not think there is anything whatever to prove that this was the case. It is only stated in a general way, but no facts are given from which any judgment can be formed. It has been said that the injunction ought not to be granted to restrain the opening of the line upon the broad-gauge principle; but it appears to me, if the effect of doing that which is restrained by injunction would be to prevent for ever the accomplishment of those things which the resolutions of a majority of the shareholders have pointed out, then the Court is bound to attend to the wishes of the majority; and as the effect of opening the railway upon the broad gauge will be inconsistent with the resolution of the shareholders, it is the duty of the Court to keep the question open until the course to be pursued is determined upon, and to continue the injunction in the present form.

The motion must, therefore, be refused with costs.

L.C. July 14. } OKILL *v.* WHITTAKER.

Vendor and Purchaser—Mistake as to Duration of Term of Years.

A bill was filed to obtain a re-assignme of some leasehold tenements, which had bee assigned to a purchaser for the residue of term of years to be computed from a spec fied time. It was afterwards discover that the term did not commence till sever years later, and that the lease would exi for twelve years longer than had been su posed:—Held, that the vendors were n entitled to any relief.

In March 1836, the plaintiffs, as truste of a settlement, put up for sale, by publ auction, certain leasehold tenements, whi they stated, in the particulars of sale, wou be sold "for the remainder of a term twenty-one years, which commenced on about the 3rd day of December 1823, bei the residue of a lease of the said premise The premises were not sold at the aucti but the plaintiffs subsequently agreed w Thomas Whittaker, whose executors w the defendants in this suit, for the sale them to him, for 300*l.* An indenture assignment was afterwards executed, be ing date the 22nd of March 1836, wh recited a lease of 1755, by which these p mises were demised for three lives, an term of twenty-one years, to commence the death of the survivor of them; and a recited that the survivor of the three p sons, for whose lives the lease was grant had died in December 1823: and the pla tiffs, then, in consideration of 300*l.*, assig the premises to T. Whittaker, for " residue of the said term of twenty-one ye

which commenced on or about the 3rd day of December 1823." It was afterwards discovered that the survivor, who was stated to have died in December 1823, did not in fact die until March 1835, and that, consequently, the term of twenty-one years would not commence until that time. The plaintiffs insisted that the consideration money was not a fair and adequate amount, and that the assignment would not pass the interest of the plaintiffs in the longer term. The bill prayed that it might be declared that the defendants were only interested in the premises for the residue of a term of twenty-one years, to be computed from 1823; and that they might be decreed to assign the premises for the remainder of the term, and to deliver up possession to the plaintiffs. The value of the property, assuming the recital as to the duration of the lease to be correct, was stated to be about 294*l.*, but if the lease had to commence in 1835, instead of 1823, the value of the property was stated to be about 495*l.* But, on behalf of the defendants, it was alleged that, as to the amount which was given for the premises, the purchaser was influenced more by the probability of obtaining a renewal than by their present value.

The cause was originally heard before Vice Chancellor Knight Bruce, who dismissed the bill with costs.

The plaintiffs appealed from that decision.

Mr. Anderdon and *Mr. C. Hall*, for the plaintiffs, contended that the property which was now held by the defendants, was not that which was contracted to be sold, nor that which had been assigned; but the defendants claimed an interest for a term of years, which was not known to be existing at the execution of the assignment, and which neither of the parties ever intended to deal with. They cited:—

Bingham v. *Bingham*, 1 Ves. sen. 126.
Calverley v. *Williams*, 1 Ves. jun. 210.
Tyler v. *Beversham*, Cases Temp. Finch, 80.
Kelly v. *Solari*, 9 Mee. & Wels. 54; s. c. 11 Law J. Rep. (N.S.) Exch. 10.
Stapylton v. *Scott*, 13 Ves. 425.
Willan v. *Willan*, 16 Ves. 72.
Darcy v. *Hall*, 1 Vern. 49.
Hitchcock v. *Giddings*, 4 Price, 135.
Carpmael v. *Powis*, *ante*, p. 31.
Cripps v. *Reade*, 6 Term Rep. 606.
Colyer v. *Clay*, 7 Beav. 188.
Bree v. *Holbech*, Doug. 630.
Bilbie v. *Lumley*, 2 East, 469.
Jones v. *Ryde*, 5 Taunt. 488.
Mortimer v. *Shortall*, 2 Dr. & War. 363.
Grieveson v. *Kirsopp*, 5 Beav. 283.

Mr. Russell and *Mr. Chandless* appeared for the defendants, but were not called upon.

The Lord Chancellor said that this was not a case in which the Court could give any relief. None of the authorities which had been cited went so far as this case. The contract had been completed, and the purchaser had been in possession for several years. It was, therefore, too late to rescind the contract; and the plaintiffs did not ask for that, but they asked that the Court would make the purchaser a trustee for the vendors as to the residue of the term after the expiration of the eight years. If the Court did so, it would make a new contract between the parties, and there would be a decree for specific performance with a variation introduced by the Court, which was against all the rules of the court. If a party contracted to sell an estate, and it was described as consisting of a certain number of acres, and it was afterwards shewn that there was a greater quantity of land, that would not give the Court jurisdiction to alter a conveyance, and decree the purchaser to reconvey a part of the estate. The parties contracted for the sale and purchase of all the interest which the vendors had in these premises, and it turned out that they had a greater interest than they were then aware of; but the Court could not interfere in such a state of circumstances, and the appeal must be dismissed with costs.

V.C. July 24. } WARD *v.* BIDDLES.

Absolute—Trust for Maintenance.

A testatrix gave 1,000*l.* *to her nephew to bring up and maintain her natural son Frederick; she then gave the residue of her property for the benefit of her four children, including Frederick:—Held, that the nephew took the* 1,000*l.* *absolutely.*

Mary Biddles, by her will, dated the 26th of July 1841, made the following bequest:—"I give, devise, and bequeath the sum of 1,000*l.* to my nephew, Thomas Biddles, son of my brother James Biddles, to bring up and maintain my dear son Frederick Biddles, so commonly called or known."

The testatrix gave and bequeathed all the rest, residue, and remainder of her money, securities for money, and personal estate and effects whatsoever and wheresoever unto and equally between her four natural children, T. H. Biddles, M. Biddles, G. Biddles, and the said Frederick Biddles, so commonly called or known. The testatrix then gave certain directions for investing the said residue for the benefit of the said children.

A question was now raised, whether T. Biddles, the nephew of the testatrix, took the said sum of 1,000*l.* absolutely, or whether it was intended to be in trust for her son Frederick Biddles.

Mr. Rolt and *Mr. Boyle* appeared for the nephew, and cited *Thorp* v. *Owen* (1) and *Benson* v. *Whittam* (2).

Mr. Webb appeared for Frederick Biddles.

The Vice Chancellor.—Suppose Frederick had died before the testatrix, it is evident that the legacy would not have lapsed. In the gift of the residue, when the testatrix intended to give money for the benefit of her children, she did so expressly. It appears to me that it is impossible to make out a trust for Frederick, especially when you consider that the testatrix has given him a share of the residue. The nephew will therefore take the bequest absolutely.

L.C. Aug. 4. } *In re* TOWNSEND.

Mortgage—1 Will. 4. c. 60—Lunatic—Reconveyance—Costs.

Where a mortgagee has become lunatic and the mortgagor petitions for a recon[illegible]ance by some person, on behalf of the m[illegible]gagee, the expense of such petition, and the order thereon, must be paid out of [illegible] lunatic's estate.

In this case a mortgage had been ma[illegible] to a party who afterwards became lunati[illegible] The mortgagor was desirous of paying [illegible] the mortgage and obtaining a reconveyanc[illegible] and presented a petition that some prope[illegible] person might be appointed by the Court [illegible] execute a reconveyance. The question w[illegible] whether the costs of the petition, and of th[illegible] order consequent thereon, were to be pa[illegible] by the mortgagor or by the lunatic's estat[illegible].

Mr. Crawford, on behalf of the mor[illegible] gagor, cited—

Ex parte Richards, 1 Jac. & Wal[illegible] 264.
In re Marrow, Cr. & Phil. 142; s. [illegible] 10 Law J. Rep. (N.S.) Chanc. 340[illegible]
In re Baker, Shelford on Lunacy, 38[illegible]
Ex parte Clay in re Towers, Ibid. 39[illegible]

Mr. Bacon, contrà, contended that th[illegible] was nothing in this case which ought [illegible] take it out of the general rule, that the [illegible] pense of obtaining a reconveyance was [illegible] be borne by the mortgagor. If the [illegible] natic had been merely a trustee instead [illegible] being beneficially interested in the mortg[illegible] money, the expense of a petition to ge[illegible] reconveyance would have fallen on [illegible] mortgagor; or if the mortgagee had b[illegible] in India, the mortgagor must have bo[illegible] the expenses of obtaining his concurre[illegible] in a reconveyance.

The Lord Chancellor said that [illegible] reasons which had been mentioned for [illegible] quiring the mortgagee to pay the costs, [illegible] not appear to him to be very satisfacto[illegible] but he found the principle laid down in [illegible] *parte Richards*, and it had been follo[illegible] twice in the cases mentioned by Mr. Shelf[illegible] and he was not willing to disturb that r[illegible] The expenses, therefore, of this petit[illegible] and of the order, must be borne by [illegible] lunatic's estate.

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(1) 2 Hare, 607; s. c. 12 Law J. Rep. (N.S.) Chanc. 417.
(2) 5 Sim. 22.

l. } HORSLEY v. FAWCETT.

es, Objection for Want of—Friendly —Recovery of Trust Monies—Con- of the Suit.

ving been found necessary to wind ffairs of a friendly society and dis- ts funds, pursuant to the trusts of constituting it, several of its mem- e appointed trustees for that purpose; es to be paid to the trustees, of whom ntiff was the survivor, were to be l with certain bankers and carried ccount of the society: the bankers vay such sums as the two solicitors, and Williams, by their respective on the bankers, countersigned by two of the society named, should require d. The principal part of the fund tributed in that manner, and the in the bankers' hands was irregularly ut and invested in the names of and Williams and the two members d to countersign the cheques. On a g filed by the last survivor of the of the fund against Fawcett and and the personal representatives of nembers appointed to countersign the praying the restoration of the fund ett and Williams, with a view to its dministration, but not seeking the ration of it by the Court, an objec- want of parties taken by Fawcett's on the ground that all the members ociety ought to be before the Court, llowed.

month of July 1796, several per- eed to form a society called the ate Society," for the relief and n old age of themselves and others uld become members with them; the members, by paying certain ms of money yearly, according to at the time of admission, should, y had been ten years members of ety and attained the age of sixty exempt from any further contri- o the society, and be entitled to an of 20*l.*, 30*l.*, or 40*l.*, as the case , for the remainder of their lives. es and regulations of the society y approved and confirmed in man- ired by the Friendly Societies Act; but it was afterwards discovered that the plan of the society was inadequate to its objects, and in the month of December 1820, five of its members filed their bill in this court on behalf of themselves and all others the members of the society, and of the several persons entitled to annuities under the rules of the society, as plaintiffs, against several other members including the plaintiff as defendants thereto, stating that the joint stock of the society then consisted of 15,500*l.*, navy 5*l.* per cent. annuities, and praying a dissolution of the society, that all proper accounts might be directed to be taken, and for a proper division of the stock amongst the members. The stock was afterwards converted into 16,275*l.* new 4*l.* per cent. annuities, and the same were transferred into the accountant-general's name in trust in the cause. In the month of May 1823 a decree was made, by which it was referred to the Master to state the nature and object of the society, and the principles and plan upon which it was founded, and whether it would be for the benefit of all its members, and just and equitable, that it should be dissolved; and provision was thereby made for the taxation and payment of the costs of the suit, and further directions and costs were reserved. On the 6th of October 1823, it was determined to dissolve the society, under the Friendly Societies Act, and a deed of arrangement of that date was drawn up and executed by the parties interested in the funds of the society, whereby the society was declared to be dissolved. The plaintiff was the last survivor of the parties to the deed of the fourth part, being the trustees of the society's funds, who, after payment thereout of certain costs, charges, and expenses specified by the deed, were to distribute the same amongst the parties entitled thereto. On the execution of the deed of the 6th of October 1823, it was agreed by all parties thereto that monies which should be paid to the trustees should, for safe custody, be deposited with some London bankers; and by a deed dated the 22nd of July 1825, made between the plaintiff and the other persons parties of the fourth part to the deed of the 6th of October 1823, of the first part, John Dixon, of the firm of Dixon & Co., bankers, of the second part, James Fawcett, as solicitor for the plaintiffs in the

suit already mentioned, and Charles Williams, the solicitor for certain defendants thereto of the third part, and J. S. Dane, accountant, of the fourth part, it was agreed that all the trust monies payable to the plaintiff and his co-trustees, should be deposited with J. Dixon, to be carried to an account to be entitled "the Helpmate Society," in the books of Messrs. Dixon & Co., bankers, who were to pay to the several persons entitled to any share in the funds, or the bearers of cheques, such sums as J. Fawcett and C. Williams and their respective executors and administrators by their respective cheques upon the bankers, and countersigned by William Reeve and Peter Ernst, should require to be paid. That deed contained a covenant, on the part of J. Fawcett and C. Williams with the plaintiff and his co-trustees, that they would not draw or sign any cheque for payment out of the funds of the society in favour of any person other than persons to be reported by Dane to be entitled to a share in the funds, excepting the cheques directed to be drawn and signed in payment of the costs, charges, and expenses already mentioned. In pursuance of an order made in the last-mentioned cause, and dated the 17th of March 1825, the Master made his report of the 9th of November 1825, which was afterwards confirmed, whereby he found the society to consist of 1477 existing members, 1,305 of whom had executed the deed of the 6th of October 1823, and that the deed had been executed by the requisite number of members. Dane, the accountant, made out the accounts, and also a report of the sums due to the defendant, members, and parties interested in the funds of the society, and cheques were accordingly drawn, signed and countersigned in favour of the parties. On the 15th of October 1828, J. Fawcett and C. Williams, in breach of their covenant with the plaintiff and his co-trustees, drew and signed a cheque for the sum of 700*l.* (the balance of the society's funds) in favour of Robert Baxter, whose name was not mentioned in Dane's report, and the same, which was not drawn in respect of costs, charges or expenses, was afterwards cashed and paid by the bankers. The sum of 700*l.*, when received, was invested by Baxter under the direction of Ernst, Fawcett, and Williams, in the purchase of 809*l.* 5*s.* 3*l.* per cent. consolidated an ties, in the joint names of W. Reeve, Ernst, J. Fawcett, and C. Williams, an the investment of the dividends ari therefrom previously to the year 1832, principal sum became afterwards incre to the sum of 908*l.* 9*s.* 6*d.* 3*l.* per c consolidated annuities, and the divide thereof were applied by Ernst, Fawc and Williams to their own private u afterwards Fawcett and Williams, with the plaintiff's consent, sold out and c verted to their own use the last-mention sum of capital stock.

In the year 1846 Richard Horsley fil the present bill against Fawcett and W liams and the respective personal represen tives of J. Dixon, W. Reeve, and P. Er deceased, stating the facts hereinbefore a pearing, charging the breach of trust so aforesaid committed, and praying an accou of the funds and property belonging to t society, and that Fawcett and Willia might be declared liable for all sums p out of the society's funds upon cheq improperly drawn and signed by them, a particularly for the sum of 908*l.* 9*s.* 3*l.* per cent. consolidated annuities, and t Fawcett and Williams might be decreed make good the same. The bill also pray an account against the personal represen tives of Ernst and Reeve, in respect of receipts of those parties, and concluding a prayer that all necessary accounts mi be taken, inquiries had, and directions gi for effectuating the purposes aforesaid.

The defendant Fawcett objected, by answer, that all the members of the H mate Society, who were members ther at the date and execution of the deeds of 6th of October 1823 and 22nd of July 18 and the legal personal representatives such of them as were dead, were intere in the matters in question in the suit, necessary parties thereto; and he submit that the bill was, accordingly, defective want of parties.

Mr. Kindersley and *Mr. Messiter*, for plaintiff, who was eighty-six years of and had survived his six co-trustees, tended that it was not necessary to m the *cestuis que trust*, under the d of the 22nd of July 1825, parties to suit, inasmuch as the bill sought onl recover the debt due under that deed,

inistration of the trust funds; ntiff was liable at any moment ed by any of the members of e Society, and had acted most instituting the present suit, and lly as regarded the defendant o was a solicitor, and admitted ance of the trust funds in his ould not state any particulars eto, or the amount thereof— *anco* (1), *May* v. *Selby* (2).

and *Mr. Collins*, for the defen- t, in support of the objection, at, by the prayer of the bill, that the amount of the deposits le good, it was meant that such ht be made good to the society, the *cestuis que trust* ought to the suit; and that as the de- cett was the agent of the per- ially interested, some of them ht to be parties to the suit, ere an account was sought of at had been done by the de- cett and the other defendant *Drohan* v. *Drohan* (3), *Douglas* (4), and *Evans* v. *Jackson* ed on behalf of the defendant

ER OF THE ROLLS, after stating ts of the case, observed, that, years 1825 and 1828 the sums en apportioned amongst the he society, by the accountant en previously appointed, had ertain sums of money had been account of costs; after these d been made there remained in the bankers of the society a cash, in the bankers' hands, be paid to the claimants of e society's funds, if any re- was alleged that that sum had out of the bank, contrary to the the several parties to the deed of July 1825, *i.e.* without the payment thereof being duly

5.
t Coll. C.C. 235.
Beat. 185.
Stu. 184.
217; s. c. 6 Law J. Rep. (N.S.)

countersigned or the previous production of the certificate of the clerk in court, that the sum was payable on account of costs. The sum was paid to Baxter, a mere agent, who had no claim whatsoever under the deed of the 22nd of July 1825; and he invested it in the purchase of a sum of 809*l.* 5*s.*, 3*l.* per centum consolidated annuities, in the names of the defendants Fawcett and Williams, the two trustees, and two other persons, in contravention of the authority contained in the deed of the 22nd of July 1825, but with the intention of benefiting the parties entitled to the money. If the money had been invested in proper names it might have been a prudent course to pursue; but it was removed from the bank not for a purpose provided for by that deed. From the year 1828, when the sum of 809*l.*, 3*l.* per cent. consolidated annuities was purchased with the trust fund, to January 1832, dividends accrued thereon from time to time; and if things had gone on rightly, the money would have been forthcoming for the use of the parties entitled to it. The defendant Fawcett declined to give any account of the money or its application. In July 1845 the sum of 908*l.* 9*s.* 6*d.*, consolidated annuities, constituting the sum of 809*l.* 5*s.*, 3*l.* per cent. consolidated annuities, and the dividends thereon accrued up to the year 1832, was sold out by Fawcett; but what became thereof did not appear. The plaintiff was the sole surviving trustee of the funds; he inquired of the defendant Fawcett what was become of the fund, and Fawcett answered, "you shall know when you have brought all the other parties interested in it before the Court." There were 1,477 persons interested in the funds originally; some of those had died, leaving a plurality of representatives, and it would be impracticable to proceed effectually with the suit, were it necessary to make all such persons parties to it. The defendant Fawcett thought he might do as he pleased with the fund in question, if he should succeed in his objection for want of parties. The defendant Fawcett did not pretend that this fund was his own; but it was argued on his behalf that, at least, some one or other of the parties beneficially interested in the trust fund must be present before the Court. If the object of the bill were to recover

the fund, with a view to its administration by the Court, the parties beneficially interested must be represented; but if it be only wished to recover the trust monies in the hands of a stranger, in order to enable the trustees afterwards to administer the same conformably to the trusts to which the same were subject, it was unnecessary to bring the parties beneficially interested therein before the Court; and Fawcett must make good the fund, unless he could by special case prove that he was not liable to do so. The prayer for an account sought only to recover the balance due from the defendant Fawcett, and did not ask an account generally: the claim, however, made by the bill if narrowed, might prove beneficial. If the defendant Fawcett had lost his papers it was a circumstance to be regretted, because he might be embarrassed in rendering his accounts; but if he would only state in his answer the circumstances known to him relating to the fund, the Court would pronounce such a decree in the cause as would be just.

Objection for want of parties overruled with costs.

M.R. June 9, 10; July 12. } WOOD *v.* THE MARQUIS OF LONDONDERRY.

Contract — Performance — Way-leave — Purchaser — Lease.

A. B. was seised of an estate, copyhold of inheritance, held of the Bishop of Durham, who was lord of the manor in right of his see. These estates were subject to a settlement made by A. B. on his marriage, and the legal estate was vested in trustees. A. B, who was tenant for life under the settlement, without power to grant leases, agreed to grant a lease of a way-leave for sixty-three years. A. B. died before any lease was executed, having, by his will, made his wife, who was tenant for life in remainder of the settled estates, his residuary legatee. She instituted a suit for the administration of her husband's estate, and, by virtue of a licence from the lord of the manor, under the sanction of the Court, she joined with the trustees in granting a lease of the way-leave for twenty-one years. The licence of the lord of the manor was recited, and it was also further recited, that two further leases of twenty-one years were to be granted, to make up the sixty-three years stipulated for by the agreement. The parties then divided the estates and the rent for the way-leave into parts, and sold them in separate lots. In the particulars of sale it was expressed that the estate was sold subject to the way-leave, and that such leave of way was subject to a renewal upon the expiration of the lease. The purchaser of the estate, upon the expiration of the lease, without consulting the purchaser of the 182l. rent for the way-leave over the estates, entered into a new agreement with the lessee of the way for its continuance for a term of sixty-three years from the expiration of the said lease, with further privileges, at an increased rent of 252l., and he contracted with the lessee that he should, under his power in the first agreement, determine the first agreement. After the execution of the second agreement, the purchaser of the estate insisted, that the first agreement was satisfied by the grant of the first lease, and if not that it determined by the second agreement, and he claimed the whole of the rent of 252l. independent of the purchaser of the rent of 182l., which was secured by the first agreement:—Held, that the first agreement was a continuing agreement for the residue of the sixty-three years, and that it was not satisfied by the lease granted; that the purchaser of the estate could not contract to defeat the purchaser of the 182l. rent, and a decree was made that the plaintiffs were entitled to the rent purchased for so much of two further terms of twenty-one years as might be granted, if the lessee should so long continue to use the way.

The Rev. John Hutton was seised of the Warden Law farm and a part of the Durham House farm, which were copyhold of inheritance, held of the Bishop of Durham, who was lord of the manor of Houghton-le-Spring in right of his see. These estates had been made the subject of a settlement dated the 21st of September 1803, which was executed upon the marriage of the Rev. J. Hutton with Sylvestra his wife, and were, by an admission dated the 23rd of September 1814, vested in James Monypenny, Robert Monypenny, and John Lloyd

nd their heirs, upon trust for John
or life, with remainder to his wife
with remainder, after a failure of
the marriage, which happened, to
John Hutton and his heirs.

e 8th of March 1823, John Hutton
grant to the Marquis of London-
om his collieries to the sea-coast, a
e for coals over the Warden Law
n House farms, for the term of
ee years, from May-day 1823, at
300*l.*, for the liberties through the
ouse farm or Warden Law farm,
urther yearly rent of 100*l.* for the
erties if they were exercised over
said estates; he was also to pay a
nt of 3*l.* an acre to the tenants, for
nd damaged in making the road.
so provided that the lessee should
rty to give up the road at the end
ear of the term, on giving twelve
notice; and at the end or sooner
ation of the lease, the lessee was to
e ground damaged by the waggon-
l leave the same in a state fit for
n, as it was previous to the agree-
d when that could not be effected,
lessee was to pay to the lessor the
the fee simple of the lands injured.
called the Seaham railway, was
ed under this agreement over both
, but no lease was ever executed
tton.

e 20th of October 1824, J. Hutton
will, and after reciting that, subject
itations in his marriage settlement,
eised in fee, he gave the settled
into and to the use of Francis
and John Leybourne since de-
nd their heirs, upon trust, by sale
disposition, to raise sufficient to
lebts; and also a sum of 3,000*l.*;
ject thereto to pay the rents to
rraway Hill, for life, with divers
rs over in favour of several other
with an ultimate remainder to the
ohn Coles and his heirs; and the
nade his wife his residuary devisee
real and personal estate, and he
l her and Francis Mascall and John
e his executors. On the 17th of
1828 the testator died, without
l his will was proved by all the
.

In 1829 Sylvestra Hutton, the testator's widow, filed her bill in this court against Francis Mascall, John Leybourne and others interested in the estates, to have the trusts of her husband's will carried into execution; and on the 2nd of July 1830 a decree was made, establishing the testator's will; and, after directing the usual accounts and a sale of the Mansion House farm, it was referred to the Master to inquire whether the testator entered into any and what contract with the Marquis of Londonderry, for the purchase of way-leave over any and what part of his real estates, and whether the same could then and ought to be carried into execution.

On the 3rd of July 1832, the Master, by a separate report, after referring to the settlement of the 21st of September 1803, and the agreement for a lease of the 8th of March 1823, found that it would be beneficial for all parties that the agreement should be carried into execution, and that the plaintiff Sylvestra Hutton proposed to grant a lease, and that a contract had been entered into by J. Hutton to grant a lease to the Marquis, and that the same could and ought to be carried into execution. This report was confirmed on the 6th of July 1832; and it was referred to the Master to approve of a lease.

By an indenture of lease, dated the 16th of August 1833, made between Robert Monypenny and Thomas John Lloyd Baker, the surviving trustees of the settlement of the 21st of September 1803, of the first part, John Ward, the trustee of a part of the Dean House farm, of which the Rev. John Hutton was seised in fee, of the second part, Sylvestra Hutton of the third part, and the Marquis of Londonderry of the fourth part, after reciting that the Bishop of Durham was seised of the manor of Houghton-le-Spring in right of his see, and that a licence to demise could not be obtained for a longer period than twenty-one years, and that it was, therefore, intended that the lease of the way-leave should be renewed for two other terms of twenty-one years each, so as to make up the term of sixty-three years agreed upon by the contract, they, by virtue of the licence of the Bishop of Durham, dated the 10th of August 1832, demised the way-leave and other privileges,

liberties, and powers, to hold the same to the Marquis of Londonderry, his executors, administrators, and assigns, for the term of twenty-one years from the 13th of May 1823, at the yearly rent of 400*l.*, payable half-yearly. This lease contained a covenant by the Marquis to pay the rent, to pay to the tenants the yearly sum of 3*l.* an acre as a recompence for damages in making the railway, and until the land should be restored to cultivation, and when the land could not be restored, then that the Marquis should, upon the expiration of the lease, pay to the persons entitled the value of the fee simple. The Marquis also covenanted to restore the land to a state fit for cultivation. And it was provided, that if the said Marquis, his executors, administrators, or assigns, should, at the end of any one year of the said term, desire to surrender the lease and the waggon-ways and privileges, and determine the said term of twenty-one years, at the end of any such year, and should give twelve calendar months' notice in writing under his hand, or under the hand of his principal manager, to the person for the time being seised or possessed of the rents, issues, and profits of the lands over which the said way-leave should extend, or to his manager, and should pay all rents and damages, and perform all covenants which, at the end of such twelve months' notice, ought to be done, then, from the end of such year, to be specified in such notice, the residue of the term of twenty-one years should cease.

On the 3rd of August 1833, upon a petition of rehearing, the order of the 2nd of July 1830 was varied, and it was ordered that the Warden Law and other the copyhold farms and lands in the parish of Houghton-le-Spring, comprised in the marriage settlement, with several freehold estates, belonging to the testator, sufficient to answer the purposes of his will, should be sold, with the approbation of the Master.

On the 22nd of July 1836, before any sale took place, Sylvestra Hutton died, having, by her will, dated the 1st of February 1834, appointed Thomas Gybbon Monypenny, and James Isaac Monypenny, and Robert Joseph Monypenny, her executors, but James Isaac Monypenny alone proved, and revived the suit of *Hutton* v. *Muscall.*

On the 9th of October 1839, the whol the Warden Law farm, and the settled of the Dean House farm with the o estates, and also the rent of 400*l.* rese for the way-leave, were put up for sal fourteen lots, the rent for the way-le having been divided into parts, which sold in lots separate from the estate which the way passed.

The particulars of sale contained a shewing the line of the Seaham Railw and in Lot 11, after describing the War Law farm, and at the same time refer to the plan, the following was added note: "The purchaser of this lot is to t the same subject to, and will be entitle the benefit of, the reservations and coven contained in the lease of the Seaham R way, so far as the same relates to the perty comprised in this lot, or to the ten and occupiers thereof, but the vendors serve for sale, by separate lot, the reserved for the way-leave by the lease."

The part of the Dean House farm was also described in the same way, wi similar note at the foot.

The particulars of sale described Lo as "the annual sum of 182*l.*, part of yearly rent of 400*l.* paid by the Marqui Londonderry for way-leave, for the proc of his collieries, over the Warden Law f and Dean House farm; and secured b lease, granted to him in 1832, for a ter twenty-one years, commencing the 13t May 1823: the lessee has a power of de mining the lease at the end of any year of term, on giving twelve months' notice, in the lease is contained a recital o agreement for two future terms of twe one years each, making the full ter sixty-three years."

The annual sum of 153*l.*, being fur part of the rent of 400*l.* a-year, was scribed by reference to the previous des tion over the Warden Law farm.

The rent of 182*l.* was purchased William Redhead, on behalf of the pl tiffs, Nicholas Wood and Ralph Park lipson, for 1,200*l.*; and by an inden of assurance, dated the 22nd of Oct 1840, and made between the said J Lloyd Baker, the surviving trustee of marriage settlement of the 21st of Sept

ber 1803, of the first part, the said John Ward of the second part, the said Francis Mascall of the third part, the said William Redhead of the fourth part, and the plaintiffs of the fifth part, the annual sum of 182*l.*, part of the 400*l.* payable by the Marquis of Londonderry, pursuant to the said articles of agreement of the 8th of March 1823, and the lease of the 16th of August 1833, was assigned to the plaintiffs as tenants in common, during the residue of the term of twenty-one years, granted by the said indenture of lease, and also during the said two further terms of twenty-one years each mentioned in the same lease, so as to make up the full term of sixty-three years contracted for by the said agreement, but subject to the power given to the said Marquis, his executors, administrators, or assigns, to determine the said contract and lease at the end of any one year of the said term.

John Gregson, the father of the defendant, became the purchaser of the Warden Law farm; but he died before the purchase was completed, having, by his will, dated the 2nd of August 1839, made his widow, Elizabeth Gregson, and his sons, John and George Gregson, and their heirs, devisees in fee and trustees.

On the 1st of August 1840, John Lloyd Baker surrendered the Warden Law farm and lands to the devisees of the purchaser, and their heirs, upon the trusts of the will of the testator; and on the 23rd of October 1840, they surrendered the same farm and lands to the defendant, George Gregson, and his heirs, for his own benefit.

The plaintiffs, Nicholas Wood and Ralph Park Philipson, received the rent of 182*l.* a-year up to the 13th of May 1844, when the lease of the 16th of August 1833 expired by effluxion of time.

The Marquis of Londonderry, upon the expiration of the first lease, desired to continue the way-leave over the Warden Law farm, and at the same time to obtain more extensive privileges: he, therefore, on the 23rd of May 1844, entered into a new agreement with the defendant, George Gregson, which stipulated that the term should be for sixty-three years from the 1st of January 1844, but if the licence to demise could not be obtained for the full term, then the lease was to be for twenty-one years in the first instance, with covenants by the lessor to obtain licences for and to grant successive leases for twenty-one years, to make up the full term of sixty-three years; that the way-leave was to be for general traffic and for passengers, at a certain rent of 252*l.* per annum, for the privilege of leading 25,000 chaldrons of coal, and a "*tentall*" rent after the same rate, for all coal led exceeding such annual quantity, but colliery and harbour materials, goods, merchandise, and general traffic were to go free; the lessee was to have liberty to terminate the lease at the end of the tenth or any subsequent year of the term, on giving twelve months' notice in writing; and on quitting to leave the ground in a ploughable state, or to pay, as or by way of compensation for not doing so, the fee simple value of the land; during the occupation of the way the lessee was to pay at the rate of 3*l.* an acre annually for the ground used, or occupied, or damaged, for the making and occupation of the way exceeding fourteen yards between the fences. The existing agreement of the 8th of March 1823, made with the Rev. John Hutton, was to be terminated either by surrender or notice, so far as regarded the line through the lands above mentioned.

The expense of the surrender or notice to determine the agreement was to be at the expense of the lessee, and the counterpart or any licence to demise was to be at the expense of the lessor, as well as the charge for perusing the same on his behalf.

The lessor was to hold the lessee harmless against the claims of the parties entitled by purchase from the trustees of the late Rev. John Hutton, deceased, to the rent made payable by the said agreement of the 8th of March 1823.

After the execution of this agreement, the defendant G. Gregson, claimed the whole of the rent of 252*l.* reserved by the agreement of the 23rd of May 1844; and he gave the Marquis notice not to pay to the plaintiffs the rent of 182*l.* reserved under the agreement of the 8th of March 1823.

The plaintiffs, therefore, on the 9th of April 1846, filed their bill in this court against the Marquis of Londonderry and Mr. Gregson; which, as amended, prayed for a declaration, that, as purchasers of the annual sum of 182*l.* they were to that extent

entitled to the benefit of the agreement of the 8th of March 1823, or of the agreement of the 23rd of May 1844, and that they were entitled to the same annual sum and the arrears and growing payments from the said Marquis, or from G. Gregson, his heirs or assigns, during the remainder of the said term of sixty-three years, to be granted pursuant to the agreement of the 8th of March 1823, or for so much of the term as the way-leave over the Warden Law farm, or any part thereof, should be used, or until it should be given up and duly determined, according to the terms of the agreement of the 8th of March 1823, and that if necessary some person might be appointed to receive the rent payable in respect of the way-leave, with direction to pay the annual sum of 182*l.* to the plaintiffs. It also asked for an injunction to restrain Mr. Gregson from receiving, and the Marquis from paying, the 182*l.*, and for a receiver.

On the 25th of April 1846, after the original bill was filed, a notice was served upon the plaintiffs on behalf of the Marquis of Londonderry, the effect of which was to apprise them that the new agreement had been made with G. Gregson, and that it had determined the agreement of the 8th of March 1823. It then went on to say, that if the agreement of the 8th of March 1823 could not be determined without notice, then they were to receive that as notice of the desire and intention of the Marquis that the same should determine at the earliest period after the service of that notice.

The cause now came on for hearing.

Mr. Turner and *Mr. Toller*, for the plaintiffs.—The agreement of the 8th of March 1823 was existing: it had been made by a tenant for life, with an ultimate remainder to himself in fee; his widow, who was tenant for life in remainder, had confirmed this agreement by electing to take the benefits given to her by her husband's will, and she had joined with the trustees in granting a lease of the way-leave to the extent of the licence which the lord of the manor could at the time grant. This did not conclude the agreement between the contracting parties: it was in part performance only, as the lease itself shewed that they contemplated the grant of two other leases to make up the full term of sixty-three years; this, at the time, was manifes the advantage of the owner of the By the subsequent sales the interest owner of the estate became adverse to the owner of the rent arising from the leave; but as the defendant E. Gregs purchased the estate subject to the re the stipulations in the agreement, he not determine that interest by any co of his own: the Marquis alone coul an end to the term of sixty-three He desired to continue the way-leav further privileges: had he desired t continue the use of the way, he ou have given a twelvemonth's notice restored the land to its original state he could not use the way-leave ur contract to defeat the rights of the plai In *Giddings* v. *Giddings* (1) a lea interest which had been purchased tenant for life of an under-lease wa liable to the trusts of a will under wh had taken a benefit, notwithstanding n under-lease could have been grant the trustee for the vendor, and no standing the tenant for life had live after the under-lease had expired by effl of time.

Mr. Roupell and *Mr. Faber*, fo Gregson.—The agreement of the 8 March 1823 could never have been en after the death of Mr. Hutton. He h power to enter into a contract to g lease for sixty-three years, and his w had she chosen, might have resiste performance of the agreement; but Hutton, who was merely tenant for li granting a lease for twenty-one year evidently intended to bind her interest The Marquis could never have enforc contract: his was a voluntary accepta what she could give. The licence mise was a condition precedent to the of the lease, and in the case of *Luf Nunn* (2), where the lord of a manc purchased a copyhold estate, with full of an agreement to grant leases, and an express exception of subsisting and agreements, still he was not bou grant a licence; no covenant, theref renew beyond the term of twenty-one could have been asked; and thoug

(1) 3 Russ. 241.
(2) 11 Ves. 170.

agreement of the 8th of March 1823 was recited, there was no covenant in the lease from which an equitable right to renewal could be implied. *Doe* d. *Potter* v. *Archer* (3) was an authority to shew that the lease had expired; and beyond that the agreement was not binding upon Mrs. Hutton, neither could her death or any subsequent act render it effectual. Mr. Gregson had purchased all the estate except the rent which was payable for twenty-one years; and the particulars of sale, when describing the Warden Law farm, did not refer to the agreement, although it referred to the lease; and this lease contained a covenant to give up possession at the expiration of the term. There was no privity of contract between the plaintiffs and the defendant. The plaintiffs' interest was not a rent-charge; it depended only upon an agreement granted without authority, and which was satisfied by the grant of the lease; and as no further benefit of renewal existed none could have been purchased. Mr. Gregson, by his purchase, became the owner of the land independent of the plaintiffs, who took their assignment without any covenant or warranty from the vendors, against whom they had no claim if the lease failed. Mr. Gregson had entered into no covenant to maintain the lease or to renew it; had he therefore purchased the interest of the Marquis, he might have extinguished the lease and the rent, and upon forfeiture he might have entered. The purchase of a reversion in the estate did not make it subject to the lease or the agreement—*Randall* v. *Russell* (4), *Hardman* v. *Johnson* (5). The term of sixty-three years mentioned in the agreement of the 8th of March 1823 was determinable by the lessee upon notice; the length therefore could only be considered for his exclusive benefit. The removal of the railway also was not a condition precedent to the determination of the term. This bill sought the performance of a fractional part of an agreement. The parties interested in the Dean House farm were not before the Court. If the plaintiffs were entitled to any relief, it was to the performance of the entire agreement of March 1823, but that had been determined by the new agreement of the 23rd of May 1844, which essentially differed from it, and also by the notice of the Marquis of Londonderry.

Mr. Turner, in reply.—The Master's report shewed that Mr. Hutton adopted the agreement for the whole term of sixty-three years, and the lease was directed to be made pursuant to the agreement; it explained why the full term of sixty-three years was not granted, and under this recital the Marquis could have compelled the grant of a new lease. The reason why the lease contained no covenant to renew, was because the trustees might not have been able to obtain a licence. The lease of twenty-one years had never been substituted for the sixty-three years. Mr. Hutton's death had not varied the rights of the parties, and both the purchasers of the land and the rent could have enforced performance of the agreement against the Marquis; and both interests being concurrent, the one could not contract to the prejudice of the other.

The Master of the Rolls.—The question was, whether the defendant, by the course adopted, had a right to defeat the plaintiffs for his own purpose. Having regard to the situation of the parties to the agreement, the mode in which they disposed of the property, the way in which they were entitled, and the events that afterwards took place, it seemed, notwithstanding the nature of the agreement of 1823, that it ought to be considered a subsisting right for the whole term of sixty-three years. There was a portion of the land over which the way-leave to the colliery passed; part of this land belonged to Mr. Gregson, and another part to other persons. Could one party having certain lands and rights so deal with the Marquis of Londonderry as to defeat entirely the right of the others? That Mr. Gregson intended to take advantage of his position, if he could, to oust the plaintiffs from any right which they had, and procure that benefit for himself, was too clear. How did the agreement stand on the expiration of the lease? There was an arrangement approved by the Court, that upon an application to the Bishop for new licences, additional leases for the full term of sixty-three years should be granted. These cases were speculative. There was no obligation upon the lord of the manor to

(3) 1 Bos. & Pul. 531.
(4) 3 Mer. 190.
(5) Ibid. 347.

grant the licences on which the renewal of the leases altogether depended. There was not the least obligation in point of law, whatever his interest might be, which prevented the Marquis of Londonderry from putting an end to the lease. That might have been done at any moment. The interests the parties had under the agreement were supposed to be entirely defeated by a lawful act, a lawful exercise of power by the Bishop of Durham as the lord of the manor, and by a lawful act reserved to the Marquis by an original agreement, but subject to these conditions the parties were connected by the agreement. The Marquis of Londonderry might have compelled the parties to do everything they could towards the renewal of the leases. Neither of them could have obstructed the Marquis in his attempt to enforce that right. He had a right to the renewal of the lease, and neither the plaintiffs or Mr. Gregson had a right to object to the agreement which gave a benefit to the other. But Mr. Gregson, though he did enter into an agreement to defeat the agreement of 1823, had no right to do so. It was not necessary to say that the agreement of 1823 could not be put an end to without carrying into effect one of the provisions, that the ground should be restored to its original state; but that was a covenant entered into by the lessee for the benefit of the landowner, who, if he had thought fit, might have waived it; but he had entered into an agreement without any of the provisions in the first agreement being put an end to, and availing himself of the position of the Marquis, he contracted to put an end to it entirely. In that way he entered into the agreement of the 23rd of May 1844 immediately after the lease had expired, and he took his chance of maintaining that agreement exclusively for his own benefit. The attempt to use the power he had, as the purchaser of the land, to defeat the rights of the plaintiffs, which came to them in respect of the land, was contrary to equity.

The plaintiffs therefore were entitled to a decree, and Mr. Gregson must pay the costs.

K. Bruce, V.C.
1846.
July 29, 30, 31.
L.C.
1847.
July 9.

SMITH *v.* BARNEBY.

Legacy—Construction—Personal Repr[redacted] sentative.

A testator bequeathed copyhold and leas[redacted] hold property, upon failure of prior tru[redacted] and limitations, in trust for his personal a[redacted] not his real representative; and he appoint[redacted] his wife sole executrix of his will and r[redacted] siduary legatee:—Held, that the testato[redacted] widow was beneficially entitled to the cop[redacted] hold and leasehold property, to the exclus[redacted] of the next-of-kin of the testator.

Thomas Newnham, who died in Dece[redacted]r ber 1819, by his will, executed a short ti[redacted]n before his death, devised certain freeh[redacted]o. estates, in trust for his two nieces an[redacted]d nephew successively, and their issue, [redacted]an in default of such issue, upon trust for [redacted]hi own right heirs for ever. And he devi[redacted]se and bequeathed some copyhold and le[redacted]se hold estates upon such trusts as wo[redacted]uld nearest correspond with the trusts of [redacted]his freehold estates; and he directed, tha[redacted]t in default of any person becoming enti[redacted]tled under his will to those copyhold and le[redacted]se-hold estates, "the same should be in t[redacted]rust for his personal and not his real repre[redacted]en-tative." And the testator bequeathed [redacted]all his residuary personal estate to his [redacted]wife, upon trust to pay thereout two legacie[redacted]s of 3,000*l.* and 1,000*l.*, and gave the sur[redacted]plus to his wife for her own use. And he [redacted]di-rected, that if his residuary personal e[redacted]state should be insufficient to pay the said l[redacted]ga-cies of 3,000*l.* and 1,000*l.*, the trus[redacted]tees should raise a sufficient sum to make [redacted]ood the deficiency by sale or mortgage of a[redacted]l or any part of his freehold, leasehold, or c[redacted]py-hold estates. And he appointed his [redacted]wife sole executrix of his will.

The testator's wife died in 1821, [redacted]and his nephew and nieces all died wit[redacted]hout issue, the survivor of them having die[redacted]d in the year 1844.

A question was now raised as to the [redacted]effect of the gift of the copyhold or leas[redacted]hold estates to the testator's personal and [redacted]not real representative. On behalf of the r[redacted]pre-

sentative of the testator's widow, it was insisted, that either in her character of executrix or as residuary legatee, she was entitled to those estates for her own use absolutely. On the other hand, they were also claimed by the parties who were the testator's next-of-kin at the time of his death, and also by other parties who were his next-of-kin in 1844, when the gift over in default of issue of his nieces and nephew would take effect. This suit was instituted by the trustees in whom the estates were then vested, for the purpose of obtaining the opinion of the Court as to the construction of the will.

The cause was first heard before Vice Chancellor Knight Bruce.

Mr. Swanston, Mr. Wigram, Mr. Russell, Mr. Teed, Mr. Lee, Mr. Rolt, Mr. Faber, Mr. C. Barber, Mr. Giffard, Mr. E. G. White, and *Mr. Campbell*, appeared for different parties.

The following authorities were cited :—

Wheate v. *Hall*, 17 Ves. 80.
Holloway v. *Clarkson*, 2 Hare, 521.
Taylor v. *Beverley*, 1 Coll. 108 ; s. c. 13 Law J. Rep. (N.S.) Chanc. 240.
Price v. *Strange*, 6 Mad. 159.
Saberton v. *Skeels*, 1 Russ. & Myl. 587.
Baines v. *Ottey*, 1 Myl. & K. 465 ; s. c. 1 Law J. Rep. (N.S.) Chanc. 210.
Cotton v. *Cotton*, 2 Beav. 67 ; s. c. 8 Law J. Rep. (N.S.) Chanc. 349.
Smith v. *Smith*, 12 Sim. 317 ; s. c. 6 Law J. Rep. (N.S.) Chanc. 175.
Harrington v. *Harte*, 1 Cox, 131.
Masters v. *Hooper*, 4 Bro. C.C. 207.
Doe d. *Garner* v. *Lawson*, 3 East, 278.
Marsh v. *Marsh*, 1 Bro. C.C. 293.
Collier v. *Squire*, 3 Russ. 467 ; s. c. 5 Law J. Rep. Chanc. 186.
Clapton v. *Bulmer*, 5 Myl. & Cr. 108 ; s. c. 9 Law J. Rep. (N.S.) Chanc. 261.
Wallis v. *Taylor*, 8 Sim. 241 ; s. c. 6 Law J. Rep. (N.S.) Chanc. 68.
Stocks v. *Dodsley*, 1 Keen, 325.
Mounsey v. *Blamire*, 4 Russ. 384.
Pyot v. *Pyot*, 1 Ves. sen. 335.
Palin v. *Hills*, 1 Myl. & K. 470.
Long v. *Blackall*, 3 Ves. 486.
Minter v. *Wraith*, 13 Sim. 52.
Cooper v. *Denison*, Ibid. 290 ; s. c. 12 Law J. Rep. (N.S.) Chanc. 404.
Robinson v. *Smith*, 6 Sim. 47 ; s. c. 2 Law J. Rep. (N.S.) Chanc. 76.
Walter v. *Makin*, 6 Sim. 148 ; s. c. 2 Law J. Rep. (N.S.) Chanc. 173.
Jennings v. *Gallimore*, 3 Ves. 146.
Withy v. *Mangles*, 4 Beav. 358 ; s. c. 10 Law J. Rep. (N.S.) Chanc. 391.
Boidell v. *Golightly*, 12 Law J. Rep. (N.S.) Chanc. 187.
Bailey v. *Wright*, 18 Ves. 49.
Bridge v *Abbot*, 3 Bro. C.C. 224.
Jones v. *Colbeck*, 8 Ves. 38.
Bird v. *Wood*, 2 Sim. & Stu. 400 ; s. c. 4 Law J. Rep. Chanc. 86.
Briden v. *Hewlett*, 2 Myl. & K. 90 ; s. c. 1 Law J. Rep. (N.S.) Chanc. 114.

July 31, 1846.—KNIGHT BRUCE, V.C.—The time that has elapsed since the commencement of the argument in this case, and the opportunity which it has afforded me of considering the will and examining the authorities, have enabled me to dispose of it to my satisfaction.

It is likely that the draft of the will in this case, after it had been settled, was altered by a different hand, and not in its altered state submitted to the person who had originally settled it. Whether, however, this conjecture is well or ill founded, the instrument for construction is merely the will as it stands : the question in the cause being, what is the meaning of the words "in trust for my personal and not my real representative" which that document contains.

It is agreed on all hands, that the word "personal" being an adjective, the substantive to which it belongs is "representatives" understood or "representatives" expressed ; that if instead of either of those two words, the substantive were "estate" understood, that would, I apprehend, be decisive against the claim of each class of the next-of-kin, as the widow was sole residuary legatee. Now, whatever may be thought of the single word "representative" or "representatives," or of the expression "legal representative" or "legal representatives," I apprehend that the words "personal representative," or the words "legal personal representative," mean ordinarily, and must *primâ facie* be taken to intend, an executor or administrator, that is, a representative in law as to personal estate, not

a kinsman or a kinswoman, not a wife or husband, not a person entitled by statute to claim distribution. Generally, also, and *primâ facie*, as I suppose, the bequest made to a personal representative when the expression is to be so interpreted, must be understood as made to that representative, not for his or her own benefit necessarily, but for the purposes, whatever they may be, for which he or she should hold or should have real estate and personal estate of the individual whom he or she is described as personally representing. Such is the meaning and effect of the language of the will before me. The dispute decides itself certainly against the testator's next-of-kin, of each class, and in favour of his widow, who was his sole executrix, and also his sole residuary legatee.

Of course, however, the context of a will containing the words "personal representative" or "personal representatives," may be such as to render it necessary or proper to read them as importing consanguinity, or as referring to a distribution, though there is no intestacy, such as would take place had there been an intestacy; and the question before me is, whether, in the present instance, the will is to be construed in either of these two latter modes. It lies, I conceive, on those alleging the propriety of either of these modes of interpretation to shew that the testator's intention is plainly so; to shew more than a doubt, since raising only a doubt, they leave his expression in possession of its proper force. The manner in which the testator uses it, in connexion with the expression "heirs or real representatives," or, in contrast to that expression, makes the contention against the widow's exclusive right neither absurd nor unfair, but does not, I think, afford sufficient proof or a sufficiently strong argument against her.

Having made particular disposition of his real estate, of which the ultimate gift was in favour of his right heirs, he makes similar dispositions of the personalty in question, substituting only for the ultimate disposition in favour of his real representatives, by which term he alludes to his right heirs, an ultimate disposition in favour of his personal representatives. I cannot venture to infer merely from this against the proper meaning of the words "personal representative," that they must be ta import consanguinity, because heirs by consanguinity.

In a possible state of circumstanc limitation of the testator's right heirs I assume, have had some operatio effect, although he died before the Will Act; but as circumstances ar were, the limitation has not and can have any operation or effect: has nc any, and could not, by the happen his death at any other time than th when it did happen, have had any. gift to his heirs in this case, if it was was a specific gift of an interest in a s subject, to the person or persons who have taken that interest if there ha no specific disposition of it. To app same or an analogous construction gift to the personal representative i sense, confers on the widow half, t only half, of the funds in dispute; l another sense, confers the whole oh executrix and residuary legatee. the limitation in question is to be rea limitation in favour of the person who have taken that subject in the abse any specific disposition of it, she i person, for every beneficial as well a purpose, in my opinion, notwithstandi observation made on the form and par language of the residuary bequest; sir widow was certainly, as I conceive, rally as well as solely the residuary leg

What, in the event of the testator l survived his nephew and nieces, anc without leaving any kindred, would been thought of a claim by the Cro the lessees of the copyhold, again widow, to the prejudice of the leaseh copyhold, subject to her life interest? unnecessary on this topic to refer William Grant's observations in *Cam* v. *Rous* (1), *Leake* v. *Robinson* (2), *Bland* v. *Lamb* (3), or any other autho

Against the widow it has been conte that had the testator meant her to ta interest in dispute, he would have gi to her by name, and that the term language of the power of sale of the hold and copyhold estate, the directi the mode of settling property to be k

(1) 8 Ves. 12.
(2) 2 Mer. 363.
(3) 2 Jac. & W. 399.

by the parties, and the provisions as to the pecuniary legacies, support the claim of the next-of-kin of one class or the other.

I have considered these remarks and the other arguments against the widow's construction, but they appear to me not strong enough to effect their purpose. Had the counsel for the various next-of-kin established, however unintentionally, that of which together they well nigh, though not quite, have persuaded me, namely, that the limitation is unintelligible, they would in effect have established the case of the widow as residuary legatee, the property being all personal. If it is, as I think it to be, not unintelligible, one sense certainly in which it may be understood is the sense for which those who support her are contending; and this, I repeat, is the ordinary sense, and *primâ facie* and correctly the meaning of the language used. The words, "personal representatives," may, as every one knows, be read in another sense, if the context is such as to require and demonstrate the propriety of that reading. The question is, whether such a context is to be found in this will. I cannot discover it. I believe that to read the words "personal representative" in this will as not meaning personal representative according to the proper import and general acceptation of the expression, would be, if not merely arbitrary, merely conjectural; and I think, therefore, the next-of-kin of such class must be considered as excluded in favour of the sole executrix, who was also the sole residuary legatee. That I have a clear opinion either of what was passing in the testator's mind when he composed or assented to the clause under consideration, or that in using it he had any particular or definite view or meaning, I have not said, and do not mean to say; but the greater the obscurity, the better the case of the residuary legatee.

The cause now came before the Lord Chancellor, on appeal from the Vice Chancellor's decision.

The Lord Chancellor (after stating parts of the will), said that nothing had been brought before the Court which satisfied him that there was any error in the decree of the Vice Chancellor. Where there was a residuary legatee, that legatee would take all the property which was not otherwise disposed of. There was a clear residuary gift in this case; but a doubt was raised from the use of the words "real representative" and "personal representative." The meaning of the testator was, that the residue of his real estate should go as real estate to his real representative, as the residue of his personal estate would go as personalty to his personal representative. He thought there was no ground for holding the gift void for uncertainty, and the appeal must be dismissed, with costs.

M.R.
July 13, 28. } MOORE *v.* CLEGHORN.

Devise—Construction—"Share and share alike" — Tenancy in Common or Joint Tenancy.

The words "share and share alike" *will be controuled by circumstances denoting that they are not used to create a tenancy in common.*

Estates vested in trustees for the benefit of three persons, with a direction to apply the income for the maintenance of the cestuis que trust, *or the survivors or survivor share and share alike:—Held, to create a joint tenancy.*

A testator devised freehold and copyhold estates to trustees and their heirs, upon trust, for the use and benefit of his three natural boys. The rents, &c. to be paid for the maintenance and education of the said before-mentioned boys, or the survivors or survivor of them, share and share alike: —Held, that there was no resulting trust, and that the sons were entitled absolutely as joint tenants.

Robert Cleghorn, by his will, dated the 7th of October 1816, after directing payment of his debts, &c., gave his freehold land in the parish of Dagenham, and also his copyhold or customary messuage at Barking Side, with the land to the same belonging, which had been surrendered to the use of his will as follows:—"Unto and to the use of Eumenes Moore, George Christopher and James Ensor," whom he appointed executors of his will, "their heirs and assigns for ever, upon trust, for the use and benefit of my natural '*Mustee*'

boys, Ralph Brush Cleghorn, Thomas Pace Cleghorn, and Matthew Cole Cleghorn, begotten by me on the body of Margaret Steel, a free Mulatto woman of the island of St. Christopher's, in the West Indies; the rents, issues, and profits to be paid for the maintenance and education of my said before-mentioned sons Ralph, Thomas, and Matthew, *or to the survivors or survivor of them share and share alike.*" After some other devises and bequests, the testator said, "I also give and devise to my said executors, administrators, or assigns, all my personal property of what nature or kind soever it may be, in trust, for my said sons Ralph, Thomas, and Matthew, whom I hereby appoint my residuary legatees." The testator died in August 1824, without having altered or revoked his will, leaving his three natural children survivors, and his will was proved on the 13th of October 1824, by Eumenes Moore and George Christopher alone, in the Prerogative Court of the Archbishop of Canterbury. Matthew Cole Cleghorn, one of the testator's natural children, died in November 1832, an infant and intestate, without issue, and without leaving any heirs. The trustees then filed this bill to obtain the direction of the Court in the administration of the testator's estate. On the 15th of April 1847, the Master by his report certified the death of Matthew Cole Cleghorn, and that Robert Brush Ashington, Joseph, the son of Elizabeth Hynson, and Alexander Lear, were the co-heirs at law and customary heirs of the testator, Robert Cleghorn. He also found that, on the 22nd of July 1824, Ralph Brush Cleghorn intermarried with Maria Berkeley, and that he died in March 1842 without issue, leaving his widow surviving; that by indentures of lease and release, bearing date respectively the 19th and 20th of November 1834, the release being made between the said Ralph Brush Cleghorn of the first part; the said Thomas Pace Cleghorn of the second part; and John Brooks of the third part; Ralph Brush Cleghorn and Thomas Pace Cleghorn, claiming to be entitled to the whole of the freehold and copyhold hereditaments, conveyed and covenanted to surrender the same to John Brooks and his heirs, by way of mortgage, to secure a debt of 4,415*l.* due to him from Ralph Brush Cleghorn, but the share of Thomas Pace Cleghorn was only to be made available in the event of the moiety of Ralph Brush Cleghorn being insufficient to pay the debt; that the said J. Brooks, by his will, dated the 13th of October 1843, after referring to the security, directed that his claim thereunder should cease, and that his trustees should re-convey the estate to Thomas Pace Cleghorn, his heirs and assigns, and he appointed Stephen Olding, Jacob Ruffy, and Benjamin Adams his trustees and executors; that John Brooks died in January 1844, and his executors proved his will; that by indentures, dated the 11th of June 1835, Elizabeth Hynson, since deceased, a sister and co-heir of Robert Cleghorn, had released all her interest in the freehold and copyhold estate to Robert Brush Cleghorn, and Thomas Pace Cleghorn, their heirs and assigns, as tenants in common; that Isabella Evans, another of the sisters and co-heirs of the testator at the time of his decease, died in March 1838 intestate, and without issue, leaving Elizabeth Hynson, one of her co-heirs at law and customary heirs, surviving; that Elizabeth Hynson, by her will, dated the 18th of July 1841, empowered her son-in-law, Daniel Hautenville, to take possession of all her effects and sell the same, and after paying expenses, if any funds were remaining, to equally divide the same between her daughter and her son; and she also desired, that any property she might thereafter become entitled to should be likewise apportioned between her three daughters, and her son, share and share alike; that Elizabeth Hynson died in August 184[illegible], leaving her son, Joseph Hynson, her heir-at-law, and Mary Maria, the wife of Daniel Hautenville, Eliza Ashington, widow of the late defendant, Gilbert Wills, and Eliza, wife of Samuel Nevil Toomer, her three daughters, her surviving; and that her will had not been proved.

Mr. Kindersley and *Mr. Pitman* appeared for the trustees.

Mr. Turner, for Thomas Pace Cleghorn.—The legal estate was vested in trustees as joint tenants, and the interest of the natural children of the testator was intended to correspond with that estate; the whole interest had therefore passed, and the income was to be applied for the children. Upon the

death of Matthew Cole Cleghorn, his interest survived to the other two children, but they had severed their joint interest by the deed they had executed to Mr. Brooks—*Knight* v. *Selby* (1).

Mr. Lloyd, for the executors of John Brooks, claimed all the rents which had accrued due to Ralph Brush Cleghorn, during his life, from a moiety of the estate.

Mr. Wray, for the Attorney General, on behalf of the Crown, claimed a right to represent the interest of Matthew Cole Cleghorn, and the rents which had accrued due to Ralph Brush Cleghorn during his life. The effect of the will was doubtful; it did not explain what interest they were entitled to; the words "share and share alike" had been held to create a tenancy in common. Could they be held to create a joint tenancy if the sons were entitled absolutely as tenants in common in fee, the result would be similar to *Middleton* v. *Spicer* (2), and *Burgess* v. *Wheate* (3).

Mr. Purvis, for the co-heirs of the testator.—The gift to the natural children was for life only.

Parr v. *Swindells*, 4 Russ. 283; s. c. 6 Law J. Rep. Chanc. 99.

Esdaile v. *Gall*, 1 Russ. & Myl. 540; s. c. 8 Law J. Rep. Chanc. 133.

Doe d. *Lean* v. *Lean*, 1 Q.B. Rep. 229; s. c. 10 Law J. Rep. (N.S.) Q.B. 60.

Mr. Schomberg, for Joseph Hynson.—The natural children took estates for life only. An heir-at-law was not to be disinherited by conjecture; and though the estates were trust estates, still they were subject to the same construction as legal estates. In *Roe* d. *Sheers* v. *Jeffery* (4) a devise to three persons, or the survivor or survivors of them, to be equally divided, share and share alike, was held to mean children living at the decease of the testator; and "share and share alike" was considered to create a tenancy in common.

Mr. Micklethwait and *Mr. Bilton* appeared for other parties.

Mr. Turner, in reply, cited—

Bateman v. *Roach*, 9 Mod. 104.

Byng v. *Lord Strafford*, 5 Beav. 558; s. c. 12 Law J. Rep. (N.S.) Chanc. 169.

The Master of the Rolls.—By the devise in his will, the testator had given the whole of his freehold and copyhold estates to trustees; he had vested those estates in the trustees jointly, for his three "*Mustee*" boys; everything which the trustees had was given to the three boys as joint tenants. No trust could result to the heirs. The subsequent words "*share and share alike*" created some doubt: it was argued that they created a tenancy in common; it was impossible to reconcile the whole of the words; he was, however, of opinion, that the three boys took equitable estates in fee as joint tenants.

Note.—See Perry v. Woods, 3 Ves. 204.

(1) 3 Scott, N.R. 409; s. c. 10 Law J. Rep. (N.S.) C.P. 263.
(2) 1 Bro. C.C. 201.
(3) 1 W. Black. 123.
(4) 7 Term Rep. 589.

V.C. July 19. { BROCKLEBANK *v.* THE WHITEHAVEN JUNCTION RAILWAY COMPANY.

Company — Compulsory Powers — Expiration of Time.

By the Whitehaven Railway Act it was provided, that the powers of the company for the compulsory purchase or taking of lands should not be exercised after the expiration of three years from the passing of the act. This period expired on the 4th of July. The company having given the plaintiff notice that they would take a portion of his land under the compulsory powers, a jury was summoned according to the provisions of the act, and assembled on the 3rd of July, but did not terminate their sittings or make their award till the 6th of July.

Upon an application that the company might be restrained from paying the money in the manner directed by the act, and from proceeding to take possession of the land, the Court granted an injunction until the opinion of a court of law should be obtained whether the compulsory powers had or had not determined.

This was a motion, on behalf of the plaintiffs, for an injunction to restrain the defendants, the Whitehaven Junction Railway Company, their secretary, servants, &c.,

from depositing in the Bank the amount awarded by the verdict of the jury to the plaintiffs, as the price for certain land belonging to them, near Whitehaven, or from issuing any precept to the sheriff of the county to deliver possession of any part of the plaintiffs' land to the said company or any person appointed by them to receive the same.

The bill for the formation of the railway from Whitehaven to Maryport was passed on the 4th of July 1844; (7 & 8 Vict. c. lxiv.) and by the 152nd section of the act it was enacted "that if the owner of any land which the company was authorized to enter into and take for the purposes of the railway should, on tender of the purchase-money or compensation either agreed or awarded to be paid, refuse to accept the same, it should be lawful for the company to deposit the said purchase-money in the Bank of England, in the name of the accountant-general of the High Court of Chancery, and thereupon all the interest in such lands, in respect whereof such purchase-money should have been deposited, should vest absolutely in the company." By the 162nd section it was enacted "that where, according to the provisions of the act, the company were authorized to enter upon and take possession of any lands required for the purposes of the railway, if the owner or occupier of any such lands, or any other person, refused to give up the possession thereof, or hindered the company from entering upon or taking possession of the same, it should be lawful for the company to issue their precept under their common seal to the sheriff to deliver possession of the same to the person appointed in such precept to receive the same, and, upon the receipt of such precept, the sheriff should deliver possession of any such lands accordingly;" and by the 220th section it was enacted "that the powers of the company for the compulsory purchase or taking of lands for the purposes of the act should not be exercised *after the expiration of three years* from the passing thereof."

On the 5th of March 1847 the railway company served a notice that they should require a certain portion of the plaintiffs' land, and they afterwards offered them the sum of 1,600*l.* for such land, but the plaintiffs refused the said offer, a sequence the company gave th notice on the 18th of May, that have the value of the land ass jury: and on the 19th of June las notice that they should proceed a jury for the 3rd of July. The j bled on Saturday, the 3rd of owing to the case being lengt adjourned to the 5th, and subs the 6th of July, when they awa plaintiffs the sum of 1,379*l.* as compensation for their land inte taken.

The question now raised wa these proceedings were valid on the jury not having given their after the expiration of the three the passing of the act, which ex 4th of July, the period allowed f pany to exercise their compulsor

Mr. Bethell and *Mr. Wray*, fo tiffs, contended, that the compa right to proceed under the powers of the act, after the expir three years, and that an injuncti be granted to restrain them from

Mr. Stuart and *Mr. Malins*, f pany, contended, that the judici ings directed by the act having before the expiration of the thre language of the act was satisfi was not necessary for the entir have terminated, and that the fir jury must be considered to bear on which they first commenced th The company, in fact, became the when the notice was first served. notice they were bound to pu all the subsequent steps were sequential upon that; but the j actually commenced their sitting expiration of the three years, t must, in point of law, have refer period. If they had terminated t on the 3rd of July that would have the time; and it was owing to t of evidence produced by the pl those sittings were prolonged, delay was, in fact, caused by th and the company ought not to su account. The following cases

Doe v. *the London and Croyd Company*, 1 Rail. Cases, 2 Law J. Rep. (N.S.) Chan

Stone v. *the Commercial Railway Company*, 1 Rail. Cases, 375.

The River Dun Navigation Company v. *the North Midland Railway Company*, Ibid. 135.

The VICE CHANCELLOR (without hearing the reply).—This appears to me to be one of the plainest cases I ever saw. The cases alluded to as to the effect of the notice when it is all within time, and as to what is the effect of one of the parties giving that notice to the other which the act of parliament requires, do not appear to me to have any relation to the present case. I am not asked to deal with any right that has arisen merely from the giving of the notice. That question remains unaffected however this question may be decided. But the real question is, what is the true construction to be given to the 220th section? Before I speak of the exact words, it is to be observed, that the act of parliament has prescribed what is to be done where the company is the taker against the will of the owner of the land, and the act of parliament has prescribed, in providing for the payment and application of the purchase-money, by the 152nd section, "that if the owner of any such lands or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid, should refuse to accept the same" it shall be lawful for the company to deposit the purchase-money in the Bank of England in a given manner, and thereupon all the interest in such lands in respect whereof such purchase-money shall have been deposited shall vest absolutely in the company. It then provides by the 162nd section, "that where, according to the provisions of the act, the company are authorized to enter upon and take possession of any land required for the purpose of the railway, if the owner or occupier of any such lands, or any other person, refuse to give up possession thereof, or hinder the company from entering upon or taking possession of the same, it shall be lawful for the company to issue their precept under their common seal to the sheriff to deliver possession of it to the person appointed in such precept to receive the same, and upon receipt of such precept the sheriff shall deliver possession of any such lands accordingly." Then comes the 220th section, which provides, with a regard for the liberties of mankind in general, "that the powers of the company for the compulsory purchase or taking of lands for the purposes of the act shall not be exercised after the expiration of three years from the passing thereof." Now, according to the plain meaning of this section, the compulsory power consists, where the parties dispute, in first of all having the amount of money to be paid ascertained by the intervention of a jury, then in payment of the money so ascertained to be the proper sum, into the Bank under the 152nd section, and then if the party does not deliver possession, the sheriff is to interfere. Now, it is said, that I am to consider, merely because the process of determining by means of a jury had commenced before the expiration of the three years, that anything might go on after the expiration of the three years which might be necessary to bring the dispute to an end as to what should be paid, and to enable the company to exercise its compulsory powers and issue the precept to the sheriff. It seems to me that this is flatly in contradiction to the terms of the 220th section, that the powers of the company for the compulsory purchase or taking of lands for the purposes of this act shall not be exercised after the expiration of three years from the passing thereof; and though it is true that to a certain extent the company has not the whole three years for the exercise of the compulsory power, because part of it is necessarily consumed in determining what is to be paid, yet it is to be observed that the compulsory power itself is made to depend upon the previous finding of a jury in case the parties dispute, and the final part is the issuing of the precept to the sheriff. Now, supposing it were true that I am to consider, which I do not, that I am bound technically to say that the price is to be taken as having been determined at nine o'clock on the 3rd of July, when the parties met. If that were so, why did they not pay the money in the course of the day, and issue the precept also in the course of the day to the sheriff? You cannot adopt such a hypothesis. The proceedings of the company themselves forbid you to adopt it; they never attempted to exercise such a power: and it appears to me

to be quite a fantastical thing to say, that when the discussion was going on from Saturday till Monday, and not finished till the Tuesday, this Court is to consider that the whole was over on the Saturday; but supposing it had been, still the money was to be paid into court and the precept to be issued, all of which could not take place till after the expiration of the time. What I am now asked to do is not to interfere with any rights, but to give effect to the plain meaning of the act of parliament in directing that the compulsory powers shall cease after the 4th of July. It appears to me this case is clearly within the meaning of the act, and the injunction must go as a matter of course.

The company moved, before the Lord Chancellor, that the order of the Vice Chancellor might be discharged, and the injunction dissolved.

Mr. Stuart and *Mr. Malins* appeared in support of the application; and—

Mr. Swanston and *Mr. Wray* opposed it.

The Lord Chancellor. — The Vice Chancellor has expressed an opinion that this was one of the clearest cases he ever saw, that the company were not entitled to go on in procuring the possession of this land under the act of parliament. Merely looking at the provisions of the act, and without taking more time to examine them, I do not propose to decide on the rights of the parties: it is unnecessary that I should. I cannot, however, but entertain very serious doubt as to whether the Vice Chancellor has come to a right conclusion upon the provisions of this act of parliament. In a case where the company is acting clearly beyond the powers of their act of parliament, the Court will not hesitate to restrain them by injunction, and to keep them within the provisions which the act of parliament has given them. If it be a matter of doubtful construction, the Court also may interfere, taking care that the parties have the opportunity of having their legal rights decided in a court of law. Then the Court either tells them to ascertain their legal rights, and abstains from interfering, or it interferes by injunction in the mean time, according to the circumstances of the case and the degree of doubt that may exist on the question of law, and also the comparative injury which may be inflicted on one side or the other, according to whether the injunction is granted or not. All those are elements of consideration in the question, whether there should be an injunction or not in the first instance. Another ingredient which is not to be lost sight of, is the conduct of the parties themselves. If it rested simply on the construction of the act, I probably should not much hesitate on what course I should adopt. But this company never commenced raising this question till the month of March; they had made their station about a year ago: and from the expiration of that year to the month of March they never attempted to take possession of this piece of land for the purpose of the station. Then these powers were to expire in July; and although they were so near to the expiration of their power, they certainly were in no great hurry to proceed; for they were bound to give a month's notice before anything was done, and after that, it was to stand over for communication with the proprietors, and another month was to intervene before they went to a jury. The actually did nothing from the 5th of March until the 18th of May. They say there was a difficulty in getting the opinion of the valuers. That might or might not be expedient; but it was quite clear, after the expiration of that first month, that they had to proceed adversely, because the proprietors took no notice whatever of their first communication. Even if they had not, they might have gone on so as to have brought themselves within a reasonable time, even if they had been taking measures to ascertain the value of the property in the mean time. Instead of which, from the month of March to the 18th of May nothing was done. From the 18th of May to the 19th of June was a necessary interval. From the 19th of June to the time when it came before a jury, whether any time was lost I am not accurately informed. The result was, that owing to that delay the period when the powers of the act were to expire arrived before the jury had given their verdict. That raises a question about which I give no further opinion than what I have already expressed: but it is the question between

'hether the act of parliament, hat at that period their power g and taking the land shall are prevented or not from complete the purchase of the purchase of which they gave ly as the month of March. If solve the injunction absolutely, estion would be to be disposed then the company would take ey were obliged to adopt. They r the provisions of the act of ay the amount the jury assessed, k, and they would obtain pos- land in the way provided for f their powers for that purpose would be justified in what ing; and, as far as they were hey would incur no further . If, on the other hand, it out that they were not autho- course proposed to be pursued, ould incur great responsibili- necessarily would incur great of which must be thrown away. be liable to a very large ex- age to the plaintiffs, for the they might sustain by their e possession of which, they remely valuable in their busi- been taken possession of by . Again, the plaintiffs make the y are now employed in build- this yard; they say that the be materially interfered with, yed, by their having a portion -building yard converted into tion. I think, therefore, that is no balance of injury which rom the one course or the other. ik that any very pressing evil the railway company from not o enlarge their station before f a court of law can be obtained, that they had no notion of and for the purpose when they resent station a year ago, and nought of enlarging it until the arch last; and when they did arging it, they lost so much here had not been that delay, in y, the opinion of a court of law been obtained, so that I might ble to act on it at the present moment. I think the inconvenience of this question being raised on the eve of the long vacation, is very much to be attributed to the company. I think the plaintiffs may sustain great damage by permitting the company to take possession of their yard, even if they are ultimately entitled to recover it. I think there is no corresponding evil likely to attach to the company from the period of possession being postponed, which, if they are right, they may be entitled to. All this would not be of weight if the question was free entirely from doubt; but I find the Vice Chancellor has expressed an opinion very decided, that the company had no such right, and although it would be my duty, if I were bound to decide on the accuracy of the opinion so expressed by the Vice Chancellor, to decide that point without reference to the opinion expressed by the Judge below, except that natural weight which belongs to the opinion of that learned Judge; still when I am weighing not the question of law at all, but the expediency of postponing the period of decision until the opinion of a court of law is obtained in November, I cannot help thinking I am justified in paying that degree of attention to the opinion of the Vice Chancellor, at least, in thinking that there is at all events a reasonable possibility that the court of law may be of opinion that the company have no such right as they claim.

On the balance of the whole, therefore, as to whether I should dissolve the injunction absolutely, or whether I should maintain the injunction, giving the parties leave to go to a court of law upon the case, to know whether the company are entitled to do what they propose to do, I think the balance is in favour of continuing the injunction on a case being directed to the Court of Common Pleas, for the purpose of ascertaining what their legal rights are. There can be no difficulty in stating the case: the facts are simple, and it turns entirely upon the construction of the act of parliament upon those facts; and I therefore continue the injunction, and make the usual order for a case to the Court of Common Pleas.

Note.—See The Queen *v.* the Deptford Pier Company, 8 Ad. & El. 910; s. c. 8 Law J. Rep. (N.S.) Q.B. 62.

K. BRUCE, V.C. } CLOUGH *v.* RATCLIFFE.
May 4, 6, 25. }

Charitable Associations—The Association called Odd Fellows—Demurrer.

Bill by certain members of a lodge of the association called Odd Fellows, against the chief officers of the association, the grand master and secretary of the district, some members of the lodge who had differed from the plaintiffs, and the lodge trustees, who had in their hands a sum of money arising from the subscriptions; stating that they, the plaintiffs, had been improperly excluded from the society, and praying for a declaration that such exclusion was void, and for a determination as to their rights to the money in the hands of the trustees, was demurred to for want of equity. Demurrer allowed.

The bill in this case was filed by E. Clough and others, on behalf of themselves and all other members of the Loyal Highland Laddie Lodge of the Independent Order of Odd Fellows, except the defendants and such members of the said lodge as concurred with the defendants in the matters thereinafter stated.

The bill stated that for above a century many thousand voluntary associations, called the Freemasons' and Odd Fellows' Lodges, and by other similar designations, had existed in Great Britain, consisting of prudent and benevolently disposed persons, chiefly of the lower orders of society, who had associated themselves together in distinct associations for the purpose of raising and maintaining by their own subscriptions separate permanent joint-stock funds, to be applied in defraying the medical expenses of their own sickness, and in affording temporary maintenance to their own families during sickness; also in paying the funeral expenses of deceased members of such associations, and contributing towards the maintenance of their widows and orphans; and that members who are resident near and intimately acquainted with each other meet together weekly, and at other regular intervals, to pay their several subscriptions, and to receive applications for relief; and that the amount of subscriptions is exclusively regulated by such meetings or lodges separately, as well as the allowances to sick members, and such subscriptions are paid to treasurers appointed by the members of such lodges, and the same are annually invested in savings' banks in the names of the trustees of such lodges respectively, who hold the funds upon no other trust or purpose whatsoever.

The bill then stated the constitution of the association called the Odd Fellows. A certain number of individuals formed themselves into a lodge. The functions of the lodge were to regulate the amount of subscriptions, to collect them, and to make allowances to sick members. The sums collected were invested in the names of trustees elected by the lodge. A certain number of lodges constituted a district association. Members sent by the different lodges of a district met at regular intervals at some central spot. These deputies elected a grand master and a secretary of the district. The functions of the district association were to regulate the sums to be paid in respect of the funeral expenses of deceased members of the lodges, and to their widows and orphans. All the lodges sent deputies to a general meeting held once a year. At this meeting certain principal officers were elected, and the affairs of the Odd Fellows in general were discussed.

The bill then stated the following case:—The Royal Highland Laddie Lodge was one of twenty-three lodges in a district, of which Salford was the central place, and which was called the Salford district. At one of the annual meetings of the general assembly of the Odd Fellows, an order was made that each lodge should make out certain financial statements, with a view to some contemplated alterations. This measure met with considerable opposition. Ten of the lodges in the Salford district refused to comply with the order. The question was discussed at the Royal Highland Laddie Lodge — the plaintiffs strongly opposing the measure, some other members approving of it. In the course of the dispute the plaintiffs were in effect expelled from the body of the Odd Fellows. At the time of the expulsion, the sum of 148*l.* was in the hands of the lodge trustees.

The bill was filed against Mr. Ratcliffe

and two other persons, who were the chief officers of the whole association of the Odd Fellows elected at the general meeting; Mr. Hancock and another person, who were the grand master and secretary of the Salford district; Mr. Butcher and seven other persons, who were the members of the Royal Highland Laddie Lodge who had taken a different view from that of the plaintiffs in the disputed question; and Mr. Witham and two other persons, who were the lodge trustees, in whose hands the sum of 148*l.* was.

The bill prayed a declaration that the exclusion of the plaintiffs and the other persons on whose behalf they sued was illegal and void; and that the plaintiffs and such other persons were then of right entitled to the benefit of the association, and of the sum of 148*l.* according to the terms and subject to the conditions existing in the said society before the said plaintiffs and such other persons were excluded; and that the defendants might be restrained from applying the said sum or any part thereof to or for any purpose except the relief of the plaintiffs and the other members of the lodge; and that the rights and interests of the plaintiffs and all other persons therein might be ascertained and declared; and that all necessary directions might be given for giving full effect to such rights and interests, either in manner aforesaid, or by repayment to the plaintiffs of the amount in which they should be found to be interested in the said property and funds; and that in the mean time the three trustees of the 148*l.* might be restrained from receiving or using the same until the further order of the Court; and that, if necessary, a receiver might be appointed of the property and assets of the lodge, and of the payments becoming from time to time due to the same; with proper directions for applying the same in conformity with the rules of the lodge.

The bill had been filed in February, and demurred to for want of equity and want of parties. The demurrer was allowed on the 4th of March, on the grounds that some of the allegations in the bill were not sufficiently precise, and that a person stated to have been the grand master of the Salford district was not a party; but liberty was given to amend the bill. The bill was accordingly amended. A demurrer was then put in to the amended bill, and this demurrer now came on to be heard.

Mr. Rolt and *Mr. Roundell Palmer*, for the demurrer, contended that the society was not a charitable institution, but was an illegal society within the meaning of the 39 Geo. 3. c. 79. They cited—

Beaumont v. *Meredith*, 3 V. & B. 180.
Reeve v. *Parkins*, 2 Jac. & W. 390.

Mr. Russell and *Mr. Hargrave*, in support of the bill.—This society was of a charitable nature, and did not come within the meaning of the 39 Geo. 3. c. 79. Even if the society were an illegal one, the Court might interfere. Where both parties intend to act illegally, and both act illegally, and are *in pari situ*, the Court will not interfere; but where no illegality is intended or contemplated, and where they are not *in pari delicto*, the Court will decide between them—*Osborne* v. *Williams* (1). There are several cases in which it was considered that such societies were within the jurisdiction of a court of equity—*Anon.* (2), *Lloyd* v. *Loaring* (3), *Ex parte Norrish* (4). *The Friendly Society Acts*, and *Nash* v. *Ash* (5) and *Ewing* v. *Osbaldiston* (6) were also referred to.

Knight Bruce, V. C.—In this case I have to dispose of a demurrer to an amended bill, filed after a demurrer to the original bill had been allowed, with leave to amend generally. The present demurrer was argued in the course of last term. The only cause of demurring specifically assigned upon the record was want of equity. I wish, in the first place, to say that I feel some difficulty upon the question, whether the bill is free from the objections upon which Lord Eldon proceeded when he allowed the demurrer in the case of *Lloyd* v. *Loaring*. It is not, I think, superfluous to add, that I doubt whether the contract of partnership, if that is the proper term, or of association for mutual assistance, or however it should

(1) 18 Ves. 379.
(2) 3 Atk. 277.
(3) 6 Ves. 773.
(4) Jac. 162.
(5) 1 Ed. 378.
(6) 2 Myl. & Cr. 53, s. c. 6 Law J. Rep. (N.S.) Chanc. 161.

be designated, which is the foundation of the suit, is shewn by the bill to be a contract so circumstanced that the principles and rules of common law can be considered as sanctioning it, or that a court of equity is bound to recognize it. I do not suggest that abstractedly such a contract, such an association, is otherwise than morally laudable; but if, from the number of persons concerned in it, or for that reason and others, the contract or engagement is of such a nature as not to enable any of the established judicatures of the realm to deal with it beneficially or usefully, or to act upon it efficaciously, without doing injustice, is it the duty of the Court to acknowledge an agreement of that kind? It may be conceded, that for every civil wrong the law of the land provides, or ought to provide, a judicial remedy. But is it inconsistent with this concession that the Court should decline to recognize a contract creating, or affecting to create, interests and claims, of which the powers and means confided by the law to the courts do not enable them to provide for the regulation, enjoyment, or protection;—or that with reference particularly to cases of this specific sort now before me, the law,—among whose oldest institutions is the power of incorporation, with ample means for the government of bodies corporate, and among whose provisions of latter times, which the changes in the habits of society have seemed to render expedient, are the statutes relating to friendly societies,—the law, which gives facilities for such associations, should not permit the adoption of every course, or every mode of effecting a laudable object, of a nature rather public than merely private, for effecting which it has provided means of a particular kind under wholesome regulations? I doubt, as I have intimated, whether, upon considerations such as these, the association which the bill brings before the Court is not without the province of the Court, and does not fall within the observations of Lord Eldon, to be found in pages 462, 470, 473, and 474, of Mr. Russell's report of the case of *Van Sandau* v. *Moore* (7), unless there is any statute (and certainly I am not satisfied that there is any) that ought to be considered as making a material difference in the plaintiffs' favour. I am not sure that the members of an association such as that described, so far as there is a description of it in this bill, must not, upon civil questions arising, be left, in the words of Lord Eldon, to regulate themselves "by a mutual understanding and a kind of moral rule," without judicial interference, where parliament has not assisted them. An impression, indeed, at once of the moral and civil advantages capable of arising from the societies called "friendly societies," and of the inefficiency or insufficiency of the institutions of the country, without the aid of parliament, to afford them, unless incorporated, stability or protection, produced, I suppose, the Friendly Societies Acts; of which the members of the association now before me have not thought fit to avail themselves; although it is probable that it might have been placed under the protection of those acts; and, if it had, the complaint of the plaintiffs, and those for whom they profess to sue, could by means of those acts, have been easily, cheaply, and safely redressed. Without that, it ought to be said, in the language of Lord Eldon in *Beaumont* v. *Meredith*, "the objects of societies such as these are of a nature which no court of justice can execute."

It may be suggested that the statutes 33 Geo. 3. c. 54, and 35 Geo. 3. c. 111. (8), recognize the legality of an association such as this, although it has not enabled itself to claim the privileges conferred by the legislature upon friendly societies. The enactment of the 33 Geo. 3. c. 54, which does not profess to be a declaratory act, commences by providing, that "it shall and may be lawful to and for any number of persons in Great Britain to form themselves into and to establish one or more society or societies of good fellowship, for the purpose of raising, from time to time, by subscriptions of the several members," and so on; and, although I do not forget the preamble of the act, nor the provision of the second section, beginning "nor shall any such society which hath already been established," yet I am not, I repeat, convinced that it was the intention of either statute, that any society which should not entitle itself by the means particularly specified, to have the benefit of the enactment, should be cognizable by the civil

(7) 1 Russ. 441; s. c. 4 Law J. Rep. Chanc. 177.

(8) The Friendly Society Acts.

judicature, if, independently of the two acts, it would not have been so cognizable.

But, assuming, in the present instance, the contract of the association stated by the bill not to be illegal,—assuming it to be one, the existence of which is not unfit to be recognized by a court of equity,—assuming that the principles of Lord Eldon's decision in *Lloyd* v. *Loaring* creates no difficulty,—the question still remains, whether a case is stated by the bill which, were the case to go to a hearing upon the bill as it stands,—the facts alleged and charged being, without addition, diminution, or variation, proved or admitted,—would entitle the plaintiffs to some relief within the range of relief specifically or generally prayed. If it would not, the demurrer ought to be allowed. Now, first, as to the declarations of right asked, it would not, I apprehend, be consistent with the rules relating to the jurisdiction of the Court to make the declarations asked, and nothing else. To make the declarations asked would not belong to the functions of the Court. In cases where the decree sought is a declaration of right alone, or an injunction alone, it would not be correct; and I suppose a decree which contained a declaration of right and an injunction, and nothing else, would not be correct. When, therefore, in what I am proceeding to say, I shall use the term "relief," I wish to be understood as meaning relief beyond a mere declaration of right. Next, as to the injunction or injunctions asked. The sum of 148*l.* is that as to which a permanent injunction is asked, and so far as it extends to more, relief is asked in terms, I conceive, too vague and too general to be granted. With regard to the 148*l.*, its amount, when the number, variety, and extent of the interests to which that sum is alleged to be subject are considered, must be thought very slight and trifling. This, however, is not all, because, conceding or assuming that there may be cases in which an injunction may be proper, without any other relief,—without a view to any other relief,—without the supposition that there is any other relief,—the present, I apprehend, is not one of those cases. I do not conceive, that, upon the record, an injunction would be proper without any view to other relief, without the supposition of there being other relief to be granted. What other relief could be granted upon this record, or given only as stated in the bill? Beneficially and usefully, I apprehend, none. For, as I conceive, this Court does not possess the capacity and means of acting efficaciously, so as, avoiding injustice, to do justice, for the purposes, or any of the purposes, for which the bill seeks to put it in action, under the circumstances which the bill states. The prayer, beyond the declaration of right and injunction or injunctions asked, is this: "that an account may be taken of the property and funds of the said lodge, and that the rights and interests of the plaintiffs and all other persons therein may be ascertained and declared, and that all necessary directions may be given for giving full effect to such rights and interests, either in manner aforesaid, or by repayment to the plaintiffs of the amount in which they shall be found to be respectively interested in the said property and funds;" and the prayer then ends with one for general relief. The bill must, I think, be understood as denying a dissolution of the society to have taken place, and also, probably, as not seeking a dissolution; nor, as I apprehend, in a suit constituted as this is, relating to an association of the description stated on the record, can the Court put an end to the association or break it up, or controul the governing body, or undertake the regulation or administration of the proceedings and concerns, as the proceedings and concerns of such an association must be regulated and administered; and if all individuals interested were added as parties to the bill, neither would the suit be manageable; nor, whether it is so or not, would the matter be mended, the bill being for relief, and not stating facts the proof or admission of which, without more being done, ought, in the actual state of parties upon the bill, to be a ground of relief, or part of the relief specifically prayed, or some relief not inconsistent with that part of the bill. That description is, I apprehend, applicable to the present bill. I allow the demurrer, but without costs.

Leave to amend has once been given; but I think, in a case such as this, it would not be right to give leave to amend again. I may add, that, although I think a conclusion against the bill warranted by principle and by authority, and, if I may speak of

myself, not at variance with any decision which I have had occasion to pronounce in any other case, it is a conclusion at which I have arrived not without hesitation, and of the correctness of which I am not confident; neither am I sure that I ought to have given the leave I did to amend, or that, upon the occasion of disposing of the demurrer, I went into the case so fully as I ought to have done. The mischief caused by this, however, cannot have been considerable. The case as it stands now, upon principle, is one of some importance, although the bill does not, in my view of it, render necessary the decision whether the association is or is not unlawful at common law, or is rendered criminal or unlawful by statute, as has been strongly argued by the defendants, upon which, if I had formed, I should decline stating, any opinion; nor do I decide whether the absence of the Attorney General upon the record is material or immaterial, correct in form or substance, or incorrect.

K. BRUCE, V.C. June 24. } SKEY *v.* GARLICKE.

Demurrer.

A defendant, who had not demurred to the bill within twelve days from his appearance afterwards put in an answer and a demurrer to the whole bill, and set down the demurrer for argument. The demurrer was overruled for irregularity.

The defendant in this suit did not put in any demurrer within twelve days from his appearance to the bill. After the expiration of twelve days, he filed an answer and a demurrer to the whole bill, and caused the demurrer to be set down for argument.

Mr. Swanston and *Mr. Southgate*, for the plaintiff, objected to the demurrer being heard.

Mr. E. G. White, for the defendant.

KNIGHT BRUCE, V.C. said, that the demurrer must be overruled.

V.C. June 2. } POTTER *v.* WALLER.

Partition—Discovery.

The plaintiff by his bill stated, t had purchased the entirety of an est that the defendants having afterward him reason for believing that they entitled to a moiety, and having prom produce the original instruments evi their title, the plaintiff was induced with the defendants in making a lease estate, but that the defendants now to produce such evidence. The bill discovery and partition. Demurrer fo of equity overruled, but without costs.

This was a bill for discovery and tion, and it alleged that Charles To died intestate in the year 1769, seised entirety of the messuage and prem question in the suit, which thereup scended upon his daughters Mary H Ann Sawdon, as his co-heiresses That Mary Hart (who was then a devised her moiety of the premises said sister for life, and after her d Francis Nodin in fee simple. That t Francis Nodin, in May 1821, demis said last-mentioned moiety to J. P. for 500 years, to commence from th of the said Ann Sawdon, and by securing an annuity of 20*l.* to the pl and that in the month of March 1 consideration of a release of the said a of 20*l.*, the fee simple in the same was conveyed to the plaintiff, and a to bar his wife's dower. That in J 1833 the plaintiff contracted with t Ann Sawdon for the purchase of her moiety of the said premises, of whi alleged she was then seised in fee, a of the remainder of her life estate other moiety, in consideration of an of 100*l.* for her life; and that in th month and year the said Ann Sawdo veyed her said entirety in the said to the use of a trustee for a deter term (since actually determined) for the said annuity of 100*l.*, and subje to uses under which the said plaintiff absolutely entitled as to one moiety life of the said Ann Sawdon, and a other in fee simple, and free from That on the execution of the last-me

conveyance the plaintiff entered into possession or receipt of the rents of the entirety of the premises, and continued in such possession or receipt up to the death of the said Ann Sawdon; and that the said Ann Sawdon died in the month of March 1834, having duly received her said annuity. That shortly after the decease of the said Ann Sawdon, the defendants Waller and Mary Sawdon Willison alleged that they were entitled to the original moiety of the said Ann Sawdon, as the devisees of Thomas Sawdon, who in the bill was stated to have been the husband of the said Ann Sawdon, and to have died in July 1818, and that they alleged that a settlement had been made on the marriage of the said T. Sawdon and Ann Sawdon, by which such moiety had become limited, in the events which had happened, to the use of the said T. Sawdon in fee simple, subject to a life interest in his said wife, and that the said T. Sawdon, by his will, dated the 22nd of April 1815, had devised such moiety to the said defendants Waller and M. S. Willison as tenants in common in fee. That when the claim was made the plaintiff required the defendants to shew by what means they supported the same, and thereupon the defendant Waller produced two papers, which he alleged to be copies of the settlement and will, but which copies were not attested nor in any manner authenticated. That after several applications, Waller sent to the plaintiff a paper writing, purporting to be a copy of such settlement, and to be a copy of an indenture of the 31st of December 1791 made between the said T. Sawdon of the first part, the said Ann Sawdon (by her then name and description of Ann Townsend, spinster) of the second part, and Thomas Collins and Wm. Allinson of the third part, whereby the said moiety of the said Ann Sawdon had been conveyed to certain uses and upon certain trusts for the said T. Sawdon and Ann Sawdon during their lives and for their children, and in the event of there being no children (an event which happened), then after the decease of the said Ann Sawdon to the use of the said T. Sawdon, his heirs and assigns for ever. That the plaintiff repeatedly applied to the said defendant Waller, and requested him to allow the plaintiff to inspect the original deed, and undertook to admit the title of the defendants to the moiety claimed by them, if it should appear that such settlement had really been executed, and that the said T. Sawdon had devised such moiety to the defendants; and that Waller promised to produce the original deed, but had hitherto neglected to do so; and that the plaintiff had never seen the said original settlement and will, and was, therefore, unable to set forth the title of the defendants with greater certainty. That the claim set up by the defendants appeared to be a probable claim, and the allegations in support thereof were so plausible that the plaintiff believed the same to be well founded; and trusting to the promise of the defendant Waller to produce the original of the settlement, the plaintiff was induced to admit the claim of the defendants to the said moiety, and to consent to join with them in a lease of the entirety; and that accordingly, by an indenture of the 1st of July 1843, made between the plaintiff and the defendants of the one part and Crowley & Crowley (copartners) of the other part, the entirety of the said premises was demised to the said Crowleys for the term of twenty-one years, from Midsummer 1843, at the yearly rent of 90*l.*: one moiety of which rent was thereby reserved to the plaintiff, his heirs and assigns; and one-fourth part thereof to the said defendant Waller, his heirs and assigns; and the remaining one-fourth part thereof to the said defendant William Willison and Mary Sawdon his wife, their heirs and assigns. That the plaintiff was induced to concur in the said demise, and so far to recognize the claim of the defendants, by the plausible representations made on their parts, and by the often-repeated promises of the defendant Waller to produce the original settlement, which he alleged he had in his own possession; but that the defendants positively refused to produce such original settlement. That on the 5th of March 1847 the plaintiff caused a notice in writing to be served upon the defendants, by which, after a statement of the circumstances hereinbefore set out, and an expression of his the plaintiff's great doubt whether there was ever such a deed of settlement, the plaintiff, as the *bonâ fide* purchaser of the entirety of the premises, without previous notice of the claims of the defendants to a moiety, gave notice to the defendants

to produce the alleged indenture on a day therein mentioned, to authenticate the said claim to a moiety, and that in the event of refusal the plaintiff would institute a suit for the purpose of a discovery as regarded the alleged indenture. That the defendant Waller, in answer to this notice, wrote the plaintiff a letter, in which, after alleging that the plaintiff had no right to make such a demand upon him, inasmuch as he, the plaintiff, derived his title to the moiety in question only as mortgagee of Nodin; and observing that he (that is, the defendant) had served Nodin with a notice on the 27th of October 1831, and referring him to Nodin for information; he, the defendant, added, that he could not comply with the request even if willing to do so, as the deed was in the hands of a creditor of his, the defendant's; adding, in a postscript, "Don't you know that all the robberies are committed by parties letting others know where their property is placed for safety?" That the plaintiff's solicitor wrote a reply to this letter, again calling on the said defendant to produce the evidence of his and his sister's claim to the moiety in question. That no answer had been sent to the last-mentioned letter, nor had the settlement ever been produced. That under the circumstances aforesaid, the plaintiff was advised that he was entitled to a discovery from the defendants of their several rights and interests in the premises, and to have a fair and equal partition of the premises between them and the plaintiff, in order that their several shares might be allotted and held in severalty.

The bill prayed that the shares of the plaintiff and defendants in the premises might be ascertained, and that a fair partition might be made of the premises between the plaintiff and the defendants, according to their respective estates and interests, and that the share of the plaintiff might be duly conveyed to him; the plaintiff offering to convey all his estate and interest in the other part of the said hereditaments and premises as the Court should direct; and that all the title deeds and writings relating to the said hereditaments in the possession of the defendants respectively might be brought into court, and deposited for the benefit of the plaintiff and the said defendants: the plaintiff offering to bring into court and deposit all the title deeds of the same premises for the like purpos that such of the deeds and writings a appear to belong solely to such par premises as should be allotted to th tiff might be delivered to him, remainder thereof, or such of them a appear to relate jointly or equally t said premises, might be preserved u direction of the Court, for the mutua of the plaintiff and the other pers terested therein, and that the plainti be at liberty to take copies thereof.

The defendants demurred to thi want of equity.

Mr. Bethell and *Mr. Dickinson*, demurrer.—In this case the plai no right to a partition. In a bill f tition the plaintiff must state his o clearly and distinctly. He is not b state the defendant's title exactly, must state a title in himself eithe or in common. Here the plaintif claims the property, but there is n tion of what the interest is; in fact no statement of the plaintiff's titl very evident that the plaintiff has p one moiety of the estate without s title. The bill is a bill of disc reality: the plaintiff wants to get p of the title deeds, so as to find a f can, and either get the defendants' entitle himself to a partition. T title he has set up is a title to the but it is imperative that a plaintif for a partition should clearly shew to the moiety. While the lease i tence, there can be no partition; plaintiff thinks that upon this bi covery he will be able to set aside t but the bill is not such a one as w him to a partition. The followi were cited in support of this argun

Cartwright v. *Pultney*, 2 Atk.

Stansbury v. *Arkwright*, 6 Sim

Mr. J. Parker and *Mr. Glasse*, port of the bill, contended that th had set out sufficient to entitle partition. He had stated *primâ fac* to the entirety, but he stated tha fendants claimed a moiety, and it known to the plaintiff under what claim was made. The plaintiff w to set forth his claim with greater he had stated his title to the enti

that the defendants refused to disclose their title. It was not incumbent upon the plaintiff to state the defendants' title with certainty, but his own was certain, because his own was the whole, minus what the defendants claimed. The whole question was made to turn upon whether the verbal statement in the bill actually set out a title. The plaintiff stated that he applied to the defendants for their title, and the defendants gave him a copy of a settlement by which it appeared that the defendants' claim was well founded; and the plaintiff finding that it was probably a good title, was induced to admit the claim of the defendants, and to join in a lease that would at any rate shew a joint interest for twenty-one years. If there were nothing more than this, that the plaintiff stated he was entitled to the entirety, subject to a joint lease for twenty-one years, he would have a right to come here for a partition. To sustain a bill for a partition, any interest, however small, would be sufficient. The following cases were cited:—

Baring v. *Nash*, 1 Ves. & Bea. 551.
Graham v. *Coape*, 9 Sim. 93; s. c. 8 Law J. Rep. (N.S.) Chanc. 47.
Balls v. *Margrave*, 3 Beav. 284; s. c. 10 Law J. Rep. (N.S.) Chanc. 36.

The Vice Chancellor.—I will tell you how the case strikes me: that the plaintiff intended to get a discovery by his bill is perfectly manifest, because he himself states that, under the circumstances, he is advised he is entitled to a discovery from the defendants of their rights and interests in the said messuage, &c. It is impossible to believe that the story he represents can be true, of the manner in which the defendants state their title, without seeing that he really means to dispute it if he can. But it appears to me that he has stated such a case as clearly shews that he is entitled only to a moiety; and as to the defendants' title to the other moiety, it follows as a conclusion of law from all the circumstances stated by the plaintiff, and from the lease itself, because that is evidence against himself, that the defendants are entitled to their moiety. I think the object will be defeated by the defendants putting in an answer admitting that the plaintiff is entitled to a moiety, and shewing that they are entitled to the other moiety; and refusing under a late Order (38th Order of August 1841) (1) to answer all the other subjects infringing their title; because if he has no title he cannot sustain this bill for a partition: although the plaintiff endeavours to shew that the representations of the defendants are not true, yet he has not said so; although he implies what his opinion is, yet in his bill he has not averred it. I must take it as shewn in his bill that he has one moiety, and that they have the other, and he has no right to inquire as to their title if they admit his. I cannot allow this demurrer, but when I see what the object of the plaintiff is, I shall overrule it without costs.

Leave given to answer.

K. Bruce, V.C. March 6; June 3. } WESTBY *v.* WESTBY. WESTBY *v.* WESTBY.

Infant—Two Suits—Reference—Staying Proceedings.

A reference to the Master to inquire which of two suits is most for the benefit of infants has not the effect, of course, of staying proceedings in both suits during reference.

The first suit was instituted by four infant plaintiffs, by Mr. Jennings, as their next friend, against their mother, Mary Westby, and others, for the administration of the personal estate of their father. The second suit was instituted by the same plaintiffs, by Mr. Pilkington, as their next friend, against the same parties, for the same purpose.

A motion was made in the first suit for an injunction and receiver; and, at the same time, a motion was made in both suits for a reference to the Master, to inquire which suit ought to be prosecuted. By an order made in both suits certain accounts and inquiries were directed; and it was referred to the Master to inquire whether it would be fit and proper, and for the benefit of the infants, that these accounts and inquiries should be prosecuted by Mr. Pil-

(1) Ord. Can. 175; 10 Law J. Rep. (N.S.) Chanc. 414.

kington, or by any and what other person, as the infants' next friend. Before the Master made his report a motion was made in the first suit, that the bill should be taken *pro confesso* against Mary Westby. This was opposed on the ground of irregularity.

Mr. Cooper, Mr. Russell, Mr. Lee, Mr. Torriano, Mr. Haldane, Mr. Schomberg, and *Mr. Steere,* for the different parties.

KNIGHT BRUCE, V.C., directed an inquiry to be made of the registrars as to the practice whether the reference made had the effect of staying the proceedings in the causes. The following communication addressed to his Honour, was read, by his direction, to the counsel in the causes:—

"Your Honour directed me to inquire whether the common form of order, 'referring it to the Master to inquire which of two suits was most to the benefit of the infants,' has the effect, as of *course*, of staying proceedings in both suits pending reference. I have inquired of several of the registrars, including Mr. Colville, and we all agree that it *does not*, although, doubtless, as a matter of prudence, it generally has that effect; and it is open to the Court to entertain any application it may think fit, or to direct it to stand over until the report is made. In *Sullivan* v. *Sullivan* (1) the Lord Chancellor refers to the practice. I have looked at the entry of that order in the Report Office; it does not contain any direction to stay proceedings, nor does the common form. The practice is, after report made, to apply for an order to stay proceedings in the defeated suit.

"E. D. Colville, Jun."

K. BRUCE, V.C. June 7, 26. } CUNNINGHAM *v.* MURRAY.

Legacy — Construction — Per capita *and* per stirpes.

A testator gave to three persons annuities of 25l. each; and gave the residue of the income of his estate, during the lives of the annuitants, to M. and N, to be paid to them during their lives, in equal shares; and, after the deaths of the annuitants, as to the residue of his estate, he gave the same to M. and their several children to be div tween them in equal shares. One of nuitants died first, then M; and, subse N:—Held, that the testator died int to a moiety of the income of his esta ject to the annuities) between the M. and the death of N; and also whole of the income (subject to the ties) between the death of N. and t of the last annuitant; and that, on t of the last annuitant, the residue w sible between M. and N, and their per capita.

John Kilkpatrick, by his will, da 29th of July 1839, gave, devised, queathed to J. T. Church and A. the sum of nineteen guineas each, trouble they should have in the tru execution of his will; he then ga vised, and bequeathed all his real a sonal estate to J. T. Church and A. upon trust, as follows: "as soon a decease as they reasonably can, to get in, and convert the same into by public or private sale as they ma proper, and to invest the same (su the payment of the several legacies cally bequeathed, and to the paymer debts, funeral and testamentary ex in the purchase of some or one of vernment stocks or funds of Great and to stand possessed of the san the dividends, interest, and annual arising therefrom; and to pay an the same, in the first place to pay debts and funeral and testaments penses." The testator then gave Louremer the sum of 100*l.*; to Mar 1,000*l.*; to Mrs. Stuart, (described a Stuart of Kent Road, widow) 300*l.*, Cunningham, (described as Agnes C ham) 300*l.*, to Helen Stuart and Stuart, two of the daughters of Mrs. the annual sum of 25*l.* a piece, to El Cunningham, daughter of Mrs. C ham, the annual sum of 25*l.* T then proceeded as follows:—"And give and bequeath the residue of t dends and annual income arising du lives of the said Helen Stuart, an Stuart (1), daughters of the said

(1) 2 Mer. 40.

(1) So in the will. It was found by the

Stuart of Kent Road, aforesaid, and Elizabeth Cunningham, unto the said Helen Stuart, the mother, and Agnes Cunningham, to be paid them half-yearly during their lives, in equal proportions, for their own separate use, and not to be liable to the controul or debts of any husband they or either of them may marry. And, from and after the death of the said Helen Stuart, the daughter, and —— Stuart, and Elizabeth Cunningham, as to all the rest and residue of my said estate and effects of what nature or kind soever, and wheresoever situate, I give, devise, and bequeath the same unto the said Helen Stuart and Agnes Cunningham, and their several children, to be divided between them in equal shares and proportions."

Mrs. Stuart and Mrs. Cunningham were living at the death of the testator, and were his sole next-of-kin at his death. Mrs. Stuart had five children living at the date of the will, who were all parties to the suit, and she had had no children since. Mrs. Cunningham had one child only, the annuitant Elizabeth Cunningham, afterwards Mrs. Hay, who was living at the testator's death. Mrs. Hay died first; afterwards, Mrs. Stuart died; and, subsequently to her death, Mrs. Cunningham died. The testator had no real estate, and did not leave a widow.

The suit was instituted for the administration of the estate of the testator. The questions were, first, as to the disposition of the surplus income of the testator's residuary estate after payment of the annuities, between the death of Mrs. Stuart and the death of Mrs. Cunningham; secondly, as to the disposition of such surplus between the death of Mrs. Cunningham and the death of the surviving annuitant; and, thirdly, as to the disposition of the residuary estate after the death of the surviving annuitant.

Sir F. Simpkinson, *Mr. Piggott*, and *Mr. J. H. Palmer*, for the representatives of Mrs. Cunningham, and—

Mr. Russell and *Mr. Goodeve*, for the representatives of Mrs. Hay, contended that the testator had in fact, by his will, divided the residue of his estate (subject to the annuities) into two equal moieties; that he intended that the income of one of such moieties, until the death of the last annuitant, should go to Mrs. Cunningham and her estate; that the *corpus* should then go to Mrs. Hay, her only child; and that the other moiety should, in like manner, be given to Mrs. Stuart and her family.

They cited the following cases:—

Wild's Case, 6 Rep. 17.
Rowland v. *Gorsuch*, 2 Cox, 187.
Morse v. *Morse*, 2 Sim. 485.
Woodstock v. *Shillito*, 6 Sim. 416.
Brett v. *Horton*, 4 Bea. 239; s. c. 10 Law J. Rep. (N.S.) Chanc. 371.
Warrington v. *Warrington*, 2 Hare, 54.
Flinn v. *Jenkins*, 1 Coll. 365.

Mr. Lee, *Mr. J. H. Law*, *Mr. Wigram*, and *Mr. Cotton*, for the representatives of Mrs. Stuart and her children, contended that the corpus of the property of the testator was properly divisible into eight parts —Mrs. Stuart and her children, and Mrs. Cunningham and her children, taking it in equal shares. They cited—

Blackler v. *Webb*, 2 P. Wms. 383.
Oates d. *Hatterley* v. *Jackson*, 2 Str. 1172.
Dyer v. *Dyer*, 1 Mer. 414.
Jeffery v. *Honywood*, 4 Mad. 398.
Dowding v. *Smith*, 3 Bea. 541; s. c. 10 Law J. Rep. (N.S.) Chanc. 235.
Lenden v. *Blackmore*, 10 Sim. 626.
De Witte v. *De Witte*, 11 Sim. 41; s. c. 9 Law J. Rep. (N.S.) Chanc. 271.
Crockett v. *Crockett*, 1 Hare, 451; s. c. 11 Law J. Rep. (N.S.) Chanc. 279.
Raikes v. *Ward*, 1 Hare, 445; s. c. 11 Law J. Rep. (N.S.) Chanc. 276.
Heron v. *Stokes*, 2 Dr. & War. 89.

Mr. Anderdon, *Mr. Shapter*, *Mr. Anderson*, and *Mr. Hubback*, for other parties.

KNIGHT BRUCE, V.C.—The facts upon which the question in this case arises as to the construction of the will are these: the testator left Mrs. Stuart and Mrs. Cunningham, both of whom are mentioned in his will, his sole next-of-kin at his death, and Mrs. Hay, called in the will Elizabeth Cunningham, surviving. Mrs. Hay has since died, having been survived by Mrs. Stuart, who was herself survived by Mrs. Cunningham,

report, and agreed upon by all parties, that by ——— Stuart was intended Agnes Stuart, one of the daughters of Mrs. Stuart.

also since deceased. Mrs. Hay was Mrs. Cunningham's only child, and Mrs. Stuart had five children only living at the date of the will, which particularly mentioned two of them. She had not any child afterwards. Those five children are parties to the suit. It appears that two of the annuitants of 25*l.* survived both Mrs. Stuart and Mrs. Cunningham, and are still living. The testator left no widow, and had no real estate. In this state of things I have had to consider, first, whether the construction, for which those who represent the estate of Mrs. Cunningham contend, can be maintained. I have been disposed to support that construction, if possible; suspecting that the testator, if he could be consulted, would so interpret the instrument. But as Lord Eldon said, in *Bootle* v. *Blundell* (2), the question is, not what the testator really meant, which never can be ascertained, but what he has authorized the Court to say was his probable meaning. I think here that it would be taking too great a liberty with the language which the testator has adopted, and that it would be unsafe, to determine that he has authorized the Court to say that his meaning was probably in favour of Mrs. Hay to the extent of a moiety. I must therefore decide, although very unwillingly, that what he gave by the words "I give, devise, and bequeath the same unto the said Helen Stuart and Agnes Cunningham and their several children, to be divided in equal shares and proportions," he intended to give equally, *per capita*, as tenants in common; so that the property is divisible in eighths—one belonging to Mrs. Stuart's estate, another to Mrs. Cunningham's estate, another to Mrs. Hay's estate, and the other five to Mrs. Stuart's five children.

But, as two of the annuitants of 25*l.* per annum each are alive, the question remains (at least I have not meant what I have said as determining or as covering the question), who are entitled to that portion of the income, between the death of Mrs. Stuart and of Mrs. Cunningham, to which Mrs. Stuart would have been entitled if she had lived until the time of Mrs. Cunningham's death; and the income, beyond the annuities of 25*l.* per annum, payable from the death of Mrs. Cunningham until the death of the annuitants? This part of the case especially has seemed, and still seems, to me, not by any means free from difficulty. With respect to that, I have not omitted to consider *Bullock* v. *Stones* (3) and other authorities. The language and provisions of the will, which are not of a common or usual kind, are, upon the whole, such as to persuade me that there is a partial intestacy; that is, that the portion of income between the death of Mrs. Stuart and Mrs. Cunningham, to which I have been just referring, and the income which has been mentioned as to accrue between the death of the survivor of them and the death of the surviving annuitant, ought to be held to belong to the estates of Mrs. Stuart and Mrs. Cunningham, as upon an intestacy. This is my ultimate impression, although I cannot declare that I am confident as to its correctness. I may say of this instrument, as Lord Eldon said of another, that "if it could be referred to a number of lawyers, they might probably entertain a diversity of opinion upon it." I may add, in a word, that I cannot, by any consideration to be given to it, assist my mind, or prepare it for the decision of the question more than it is prepared already.

As to the conclusion of partial intestacy, which may be thought specially doubtful, it is to be observed, that, before making any one of the beneficial gifts made by the will, except the legacies of nineteen guineas each to trustees for their trouble, the testator goes on thus: "Upon trust, as soon after my decease as they conveniently can, to collect, get in, and convert the same into money, by public or private sale, as they may think proper, and to invest the same, subject to the payment of the several legacies by me specifically bequeathed, and to the payment of all my just debts, funeral and testamentary expenses." He then makes the bequests to M. Louremer and Mary Baker, and the bequests to Helen Stuart and Agnes Cunningham, of 300*l.* each, and then the annuities of 25*l.* each to Helen Stuart and Agnes Stuart, and Elizabeth Cunningham; and after this, he gives the residue of the dividends and annual income arising during the lives of these three annuitants, unto the said Helen Stuart, the mother, and Agnes

(2) 19 Ves. 494.

(3) 2 Ves. sen. 521.

Cunningham, to be paid them half-yearly during their lives, in equal proportions; and from and after the death of the three annuitants, as to all the rest and residue of his estate, he devises and bequeaths the same "unto the said Helen Stuart and Agnes Cunningham, and their children, to be divided between them in equal shares and proportions." Now, the gifts which I so read as gifts to Mrs. Stuart and Mrs. Cunningham, and their children, *per capita*, became, as I apprehend, vested upon the testator's death, although they would, perhaps, have comprised any child of either Mrs. Stuart or Mrs. Cunningham coming into existence after his death; but, as I think myself bound to interpret this instrument, the enjoyment was deferred until the decease of the survivor of the annuitants. It has introduced, then, the words, "from and after the death of Helen Stuart, —— Stuart, and Elizabeth Cunningham." And although he next says, "as to all the rest and residue of my estate and effects of what kind soever and wheresoever situate," the general investment in the funds must be recollected. There appears to me an exclusion from the final gift of such portion of the dividends previous to the death of the surviving annuitant as I have mentioned. I think that there is an intestacy as to that portion of the income between the deaths of Mrs. Stuart and Mrs. Cunningham, which Mrs. Stuart would have taken if her death had been deferred till the time of the death of Mrs. Cunningham; and I think that from the death of Mrs. Cunningham until the death of the surviving annuitant there is an intestacy as to the whole of the income, except the annuity or annuities for the time being.

V.C. July 3. } COOKE *v.* CHOLMONDELEY.

Will—Lunacy of a Testator—Forfeiture—Issue.

A testator, after giving certain benefits under his will to his daughter, who was his heiress-at-law, directed that if his daughter, or any person in her name, should dispute the will, or refuse to confirm it when required to do so, the disposition in her favour should be forfeited. A commission of lunacy had been issued against the testator, and had not been superseded at the date of his will. The testator's daughter and her husband refused to confirm the will. A bill was filed to establish it, and a trial was directed to ascertain whether the daughter had forfeited the benefits conferred upon her. The Court of law decided that they were forfeited. A bill was now filed by the trustee of the daughter's marriage settlement, which contained a clause that any property to which she might become entitled should be settled upon her and her children; and by this bill a second trial was asked for. Evidence was produced that the testator was of sound mind at the time of making his will:—Held, under the circumstances of the case, that it was important that the transaction should be thoroughly sifted, and that an issue devisavit vel non *ought to be directed.*

This suit was instituted for the purpose of establishing the will of Sir Gregory Osborne Page Turner, dated the 18th of June 1841, and for having the trusts carried into effect. The testator directed the trustees of his will to pay an annuity of 2,000*l.* out of the rents of his estates, to his daughter Helen Elizabeth (who was his heir-at-law), and the residue of the rents to his wife during her life, and after the death of either of them to pay the whole to the survivor; and, subject thereto, he devised his estate to the first and other sons of his daughter successively in tail, with remainders over. And he directed that if his said daughter, or any person in her name or on her behalf, should dispute his will, or his competency to make it, or should refuse to confirm it when required so to do by his trustee; or if any proceedings should be taken at any time, by any person whomsoever, by any possible result of which a greater benefit might be attainable by her than was intended for her by the will, and she should not formally disavow, stay or resist such proceedings to the full extent of her ability, then the testator revoked the annuity and all the other benefits given to her by his will, and directed his trustees to pay her an annuity of 300*l.* only, and, after his wife's death to accumulate the surplus of the rents, and to stand possessed of the accumulations in trust for the person who should first become entitled to an estate of

inheritance in his estate. The testator's daughter was married, at the date of his will, to the defendant, the Rev. Charles Fryer, and, by certain articles made previously to the marriage, on the 21st of August 1838, the said C. Fryer covenanted that, when his intended wife should attain the age of twenty-one years, he, the said C. Fryer, would join with her in conveying, settling, and assigning all such freehold, copyhold, and leasehold estates as she should then be possessed of, or at any time or times thereafter should become entitled to in reversion, remainder or expectancy to the trustees of the said marriage articles to be settled by them in strict settlement. The trustees named were the defendants, Henry Edmund Fryer, T. Cooke, and J. Moore. After the decease of the testator the trustees of his will required his daughter and her husband to execute a deed for the purpose of confirming this will, but they refused to do so, on the ground that the testator was *non compos mentis*, and incapable of making a will. The cause came on for hearing, and an order was made directing the following case to be sent for the opinion of the Barons of the Exchequer—Whether the annual rent-charge of 2,000*l.*, bequeathed by the will of Sir G. O. P. Turner, for the life of his daughter, the wife of C. L. Fryer, in trust for her, and the estate for life, thereby devised to her, was in any manner forfeited, revoked, diminished, or affected at law, by any and which of the acts of his said daughter and her husband, or either of them. The case was argued on the 13th of February 1846, before Barons Parke, Alderson, Rolfe, and Platt, and reported 14 *Sim.* 493. On the 26th of June 1846, the Barons certified as follows:—" We have heard this case argued by counsel, and having considered the same, are of opinion that the annual rent-charge of 2,000*l.* and the estate for life, devised to Helen Elizabeth Fryer, and the liberty of residing in the mansion house devised to her, are forfeited, by the circumstance that she and her husband have disputed the will of her father, and his competency to make the same, and have refused to confirm the same, after having been required so to do."

The cause now came on for hearing, the objects of the defendants being to induce the Court to send another case for the opinion of a court of law. It appeared evidence that a commission of lu been issued against Sir G. O. P. the testator, in the year 1823, whe found a lunatic; that the finding of was traversed in 1826, but a ver returned in favour of the inquisiti a committee of his estate and per appointed; that subsequently, upo plication to the Lord Chancellor indulgences were granted to the but the commission was never su and remained in force till the day of of the testator, a period of twenty y appeared, also, that the will was pre Mr. Maberley, a solicitor who had b mately acquainted with the testat great number of years, and who person under whose direction the sion of lunacy had been originall cuted. By the affidavits of Mr. M and other evidence, it appeared testator's health had been much i during the last few years of his li was alleged that he was so far r from his insanity as to be fully c to make a will.

Mr. Stuart and *Mr. Freeling* for the plaintiffs, and contended, t the evidence produced it was clear testator had lucid intervals, and sound state of mind at the period o his will; that though he might h insane upon certain particular sub was perfectly well able to unders arrangement of his affairs, and to valid disposition of his property. lowing cases were cited—

Levy v. *Levy*, 3 Mad. 245.
Wilson v. *Wilson*, 14 Sim. 405;
Law J. Rep. (N.S.) Chanc. 2

Mr. Bethell and *Mr. Saunders* for the trustees of Mr. and Mrs. marriage articles, and contended decision of the Court of Excheq wrong in finding that there had be feiture of the benefits given by the to his niece; that, consequently, case should be sent to a court of la testator at the time of making his been found a lunatic, and the con had not been superseded. If suc could be supported, then any pers make a will for a lunatic, and by i

a clause of forfeiture, like that contained in the will of Sir G. O. P. Turner, the will would be good. This would be directly contrary to public policy, and the validity could never be questioned, because the person who took an interest under it, and was the proper person to try its validity, would be in danger of losing the benefit conferred upon him. It had been alleged that the will was made during a time when the lunatic had a lucid interval; but it would be a very dangerous precedent to allow such a course to be taken while there was actually a commission of lunacy existing. The application for a new trial was now made by the trustees of the marriage articles, who were the proper persons to make the request, as they had the interest of unborn children to protect. The following cases were cited—

The Attorney General v. *Parnther*, 3 Bro. C.C. 441.
Creagh v. *Blood*, 2 J. & Lat. 509.
Huguenin v. *Baseley*, 13 Ves. 105.

Mr. J. Parker and *Mr. Teed*, *Mr. Lee*, *Mr. Willcock*, *Mr. Lewin*, *Mr. Piggott*, *Mr. Walford*, *Mr. Schomberg*, and *Mr. Fisher* appeared for other parties.

The Vice Chancellor.—I do not intend to hear counsel in favour of the issue; because during the discussion I happened to look at the articles, and I must say, that this case appears to me to be in a most singular position, and I cannot recollect any case that at all seems to me to resemble it; for it has this most remarkable complexion, that in the year 1814 a commission issued against Sir Gregory, that was superseded in the year 1815; and in the year 1823 a second commission issued, which lasted undisturbed, and without any attempt to disturb it, as I understand, until the time of his death in March 1843: so that it lasted for a period of twenty years and a half, or thereabouts. It appears that the will in question was framed in the year 1841, and that there were several interviews between Mr. Maberley (of whom I mean to speak with the greatest respect, as I have known him from his earliest youth) and Sir G. O. P. Turner preparatory to the final execution of the will; and they are stated at length in the depositions. These interviews happened at several distinct times, with considerable intervals; so that there was nothing like hurry; and there was ample time for Sir Gregory to understand what it was he was doing. It appears that there were interviews on the 22nd and 29th of April, on the 6th, the 13th, the 20th, and the 27th of May, and on the 2nd and the 15th days of June 1841; and the will, as far as the form goes, was duly executed and attested on the 15th of June. Now, with reference to the evidence given by Mr. Maberley, it really amounts to this, that submission to the existing commission is assumed to be an evidence of sanity, and a desire to oppose it is assumed to be an evidence of insanity, and in proportion as the desire to oppose it subsided it seems to have been considered that to that extent there was a return of right understanding; and it is stated most distinctly, as evidence of returning understanding, that what Sir Gregory wished was not total freedom from the commission, but that he might have certain indulgences, namely, a carriage and a little pocket money, and that he might be at liberty to walk about. I can understand that there might have been a greater degree of tranquillity of mind; that seems to be undisputed: but whether there was that perfect sanity which the law requires for the purpose of making a will is a matter which I cannot but think ought further to be inquired into. It appears to me to be a most fearful thing that a commission should be allowed to remain undisturbed for twenty years, and that in the course of that time a dealing should be had between the alleged lunatic and the person who knew him from his boyhood, as is stated upon Mr. Maberley's evidence with the greatest possible fairness, who was himself the solicitor to the commission, and who managed all the matters in which the lunatic was concerned under the commision;—that such a person should so deal with the lunatic as to gain from him the execution of a will, and that without any notice to the Lord Chancellor (the person who holds the custody of lunatics); that he should, at the same time that he is procuring this most solemn evidence of sanity, knowingly allow the commission to continue to exist; and I cannot but think, that it is a most important thing for the due administration of the affairs of mankind

such a transaction should be thoroughly d. I do not speak of the will in par- lar, except with regard to the clause of triction which is mentioned upon the positions; and, as I understand the depo- tions, the clause itself emanated from the ind of Sir Gregory, and not from Mr. Maberley. Now, it appears to me, that if there is to be an inquiry about the sanity of the testator, that clause itself may furnish most serious, and what I may call heart- rending, searches of mind with respect to this: whether the clause itself, emanating from the mind of the testator, does not of itself afford something like a latent con- sciousness that the party who invented it had a secret feeling that he was not in that proper state of mind which the law required him to be in to execute a will legally. Then there is this further thing to be ob- served: the will having been duly executed on the 15th of June, an affidavit was made by Dr. Warburton on the 21st, which affi- davit was taken as the ground of proceedings in the lunacy, for the purpose of procuring those petty indulgences which it seems Sir Gregory had set his heart upon; and the affidavit having been made by Dr. War- burton on the 21st does not, as I read it, tend to give the least hint that there was a recovery of understanding; and it could not very well do so, because the object was to obtain indulgence and partial remission of restraint, upon the footing, that though it might be right to continue the lunacy, still restraint might be diminished and indul- gence granted.

Then the petition, which was the next step, was presented by Mr. Maberley on the 23rd of June, and it appears that on the 20th of July there was the order of refer- ence, and on the 7th of August the order was made for the increase of maintenance, and that went on undisturbed until the death of the party; after that a suit was instituted with great propriety, and it be- came necessary to examine witnesses to support the will. It is to be observed that the final interrogatory, which by the 32nd of the General Orders of 1833 (1) is directed to be in a certain form, as to the general knowledge of the witness was omitted.

[*Mr. Freeling* explained that he was con- stantly in the habit of leaving that interro- gatory out, and he believed it was also the practice with other pleaders.]

At any rate there is this consequence, that the Court does not know what answer would have been given provided that interrogatory had been put to Mr. Maberley. I say this without the least desire that there should be the slightest blame thrown on Mr. Maberley. The matters may be capable of explanation; but the question is, whether the thing ought not to be put in such a course of trial as that it might meet with an explanation such as may be satisfactory. Here, then, we have the fact that subsequently to the execution of the will the solicitor to the commission proceeds to make the applications I have described, for certain indulgences, and thereby holds out to the great seal, and con- sequently to all the world, that this gentle- man, who is now alleged to have been sane was at that time a fit subject for a com- mission of lunacy; and I feel in the stronge manner that if ever there was a case whi deserved investigation before a jury, this a case of that character. Objections ha been made to the further sending of matter for trial, because it is said in first place that the heiress-at-law does ask for it. That is true; and there se to me to be very good reason why they should not ask it. That is apparent on the face of the clause, which has subjected them to forfeiture in case they, any or either of them, or any person on their behalf, shall dispute the will. But when I find there were, prior to the marriage, those particular articles of settlement made which have been the subject of discussion, and that by those articles Mr. Fryer, the husband, has bound himself to concur in the settlement of any estate which might descend upon his wife, and I find that that settlement is of such a form that the daughter may take a bene- fit by means of the settlement to be made it does appear to me that it is a perfect right thing for Mr. H. Fryer to come fo ward and ask for an issue, because he the only person who is invested wit capacity for asking for the second I admit at once the propriety and the of the observation, that if person brought forward in the court as suitor by no means the duty of the Court them at variance, and make them tr

(1) Ord. Can. 58; 3 Law J. Rep. (N.S.) Chanc. 5.

tions between themselves, which they might be willing to avoid. But when I find that in this case the question really is, whether there has not been a fraud practised upon the great seal, it does appear to me that it is the duty of the Court, if it finds any one person who has but a small interest in the matter, to listen to the request of that person, that the question shall be further tried. Now, it appears to me that Mr. H. Fryer is in effect only discharging that duty of trusteeship which was imposed upon him, by becoming a party to the marriage articles. He only asks that there shall be the power created of carrying into effect those articles so far as the husband and wife may choose to carry them into effect. He has, no doubt, a right to bind the husband if the wife is willing, but it seems to me that all he asks is this, that it may be fairly tried, whether the inheritance has descended upon Mrs. Fryer; and when that has been determined, then the question will arise whether due effect can be given to the marriage articles. My opinion is, that by virtue of those articles the trustee has acquired a right and allowed to be imposed on him the duty of seeing that those articles are carried into effect, if by possibility they may be. As a trustee for the unborn female issue of the marriage, he has a direct duty, as it appears to me, to ask that there shall be this second trial, in order that it may clearly be determined whether the inheritance has descended on Mrs. Fryer or not; and my opinion is, that the case is in itself most proper to be tried, provided only that there is a proper person to ask for the trial, and that he has acted most properly in bringing this forward: therefore I think that there ought to be an issue *devisavit vel non*, and that those persons who are the plaintiffs in equity should be the plaintiffs at law, and Mr. H. Fryer should defend the issue.

M.R. July 6, 26. } RYALL *v.* HANNAM.

Legacy—Construction—Error in Name and Sex of Legatee, where rectified—Parol Evidence.

An error in the name and sex of a legatee will be rectified by a designation in a will and by the context, when it can apply to no other person; and parol evidence will be admitted to raise and remove latent ambiguities.

A testator gave a copyhold estate to his nephew, William Bell, for life, and after his decease to trustees, as follows:—"Upon trust for Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of Gillingham, single woman, and who formerly lived in my service, for life, and after her decease for all and every the child and children of the said E. Abbott, as tenants in common." In default of such issue with remainder over. It appeared that there was no such person as Elizabeth Abbott, a natural daughter of Elizabeth Abbott, single woman, but there was John Abbott, a natural son of Elizabeth Abbott, whose reputed father was William Bell, a nephew of the testator. The testator's relations insisted that the bequest had failed for ambiguity, and they filed this bill, claiming a division of the proceeds of the estate:—Held, that the gift did not fail, and that the children of John Abbott, who was dead, were entitled.

William Read, by his will, dated the 9th of March 1798, after some gifts to his several relations, devised as follows:—"All that my copyhold estate of inheritance situate in the hamlet of Bourton, lately purchased by me of my nephew William Bell, and which I have surrendered to the use of my will, I give and devise unto my said nephew William Bell, and his assigns, for and during the term of his natural life; and from and after his decease, I give and devise the same unto Edward Hannam and William Whitaker, and the survivor of them, and the heirs and assigns of such survivor, in trust to support and preserve the contingent uses and estates hereinafter limited; and from and after the decease of the said W. Bell, in trust for Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of Gillingham, single woman, and who formerly lived in my service, and her assigns, for and during the term of her natural life; and from and after her decease then in trust for all and every the child and children of the body of the said Elizabeth Abbott, the daughter, lawfully to be begotten, equally between and amongst them, share and share alike, as tenants in common, and not as joint tenants." And in default

of any such issue, the testator devised the estate to the same trustees and their heirs, upon trust to sell and divide the residue of the monies, after paying the costs, amongst his several relations in his said will named. The testator appointed William Bell, Edward Hannam, and William Whitaker his executors, and they, on the 19th of June 1798, proved the will. The whole of the testator's estate, with the exception of this copyhold, had been distributed amongst the parties entitled in a suit of *Silcox* v. *Bell* (1). William Bell, the tenant for life, took possession of the copyhold estate, and received the rent till his death, on the 8th of October 1839. Ann Ryall, and others, on behalf of themselves and all other persons entitled as relations of the testator, then filed this bill against Edward Hannam, the surviving trustee and executor, and against the children of John Abbott, deceased, asking for a direction that the produce of the said copyhold estate might be ascertained, and divided amongst them.

It was in evidence that for several years previous to 1791 Elizabeth Abbott lived in the service of the testator, when she became pregnant; that the testator's nephew, William Bell, was the reputed father of the child; that the testator desired that he should marry her, but he refused; that she afterwards left the testator's service, and went to reside at West Bourton, in the parish of Gillingham, about half a mile from the testator's house, upon the estate now in question; that she was, on the 30th of November 1791, delivered of a male child, who was christened John Abbott; that after the birth of the child the testator went to visit her, and treated her kindly; that she afterwards went to reside with her father at Buckham Weston, which adjoins Gillingham parish; that early in 1795 Elizabeth Abbott married John Caddy, and was called Betty Caddy, by whom she had a daughter Margaret, who was born in November 1795, in the testator's lifetime; that she visited the testator frequently with her daughter, and was treated kindly by him; that Margaret Caddy, in August 1829, married Peter Austin, who died, leaving her a widow; and that Elizabeth Abbott never had any other illegitimate child. Upon the decease of William Bell, John Abbott claimed the estate under the devise made in the will. He afterwards died, leaving Ann Abbott, and several other children, the defendants, who also claimed the estate under the devise.

Mr. Purvis and *Mr. Bird*, for the plaintiffs.—The description in the will does not apply to John Abbott, and there are two rules deducible from the reports with respect to the admission of parol evidence. The first is, that the Courts will not admit of parol evidence to construe an imperfect bequest in favour of any object, unless it in some degree answers the description; and the second rule is, that evidence will not be admitted in favour of an imperfect bequest, if there is any object which answers the description—*Miller* v. *Travers* (2), *Selwood* v. *Mildmay* (3), *Day* v. *Trig* (4), *Hunt* v. *Hort* (5), *Hampshire* v. *Peirce* (6). The gift over in default of such issue cannot relate to the children of John Abbott; it must be construed with reference to the children of a female—*Denne* d. *Briddon* v. *Page* (7), *Doe* d. *Liversage* v. *Vaughan* (8), *Hay* v. *the Earl of Coventry* (9). If there be anything to which the bequest applied, then evidence may be admitted, but there is nothing which applies to John. The claim of Margaret is more capable of support, but extrinsic evidence cannot be admitted—*Doe* d. *Hiscocks* v. *Hiscocks* (10), *Holmes* v. *Custance* (11), *Andrews* v. *Dobson* (12). The object, therefore, is altogether uncertain, and must be considered to have failed for ambiguity, and the plaintiffs are, consequently, entitled.

Mr. Kindersley and *Mr. Crawford*, for the children of John Abbott.—The testator's will was made in a hurry, and though it was not executed for a month, still it never was

(1) 1 Sim. & Stu. 301; s. c. 1 Law J. Rep. Chanc. 137.

(2) 8 Bing. 244.
(3) 3 Ves. 306.
(4) 1 P. Wms. 286.
(5) 3 Bro. C.C. 311.
(6) 2 Ves. sen. 216.
(7) 11 East, 603, n.
(8) 5 B. & Ald. 465.
(9) 3 Term Rep. 83.
(10) 5 Mee. & Wels. 363; s. c. 9 Law J. Rep. (N.S.) Exch. 27.
(11) 12 Ves. 279.
(12) 1 Cox, 425.

considered again. The leading idea in the testator's mind was to make a provision for a natural child. The particular intention is clear upon the face of the will. Elizabeth Abbott was of Gillingham, and she lived in the testator's service when she became pregnant; William Bell was the reputed father; the testator took an interest in the girl, and desired that his nephew should marry her, and it was clear that she never had any other illegitimate child. It was open for the Court to correct a misdescription of another kind: why, therefore, could not the misdescription of sex be got over? It was a mere mistake in the name, and the difference of sex was consequent upon that mistake.

Blundell v. *Gladstone*, 11 Sim. 467; s.c. 12 Law J. Rep. (N.S.) Chanc. 225.
Beaumont v. *Fell*, 2 P. Wms. 140.
Masters v. *Masters*, 1 Ibid. 421.

Mr. Roupell and *Mr. Campbell*, for Margaret Austin.—The words used by the testator apply to a female, and refer to a daughter; the whole construction rests on that word, for in the gift over the children of a female are contemplated. The Court can supply the error in name, and it will not allow a wrong description to defeat a legacy.

Stockdale v. *Bushby*, 19 Ves. 381; s. c. Coop. 229.
1 *Jarman on Wills*, 333.
Standen v. *Standen*, 2 Ves. jun. 589.
Doe d. *Le Chevalier* v. *Huthwaite*, 3 B. & Ald. 632; s. c. 3 Moo. 304.
Door v. *Geary*, 1 Ves. sen. 255.

Mr. Purvis, in reply.
2 *Swinburne on Wills*, p. 456.
Goodright d. *Lloyd* v. *Jones*, 4 Mau. & Selw. 88.

The MASTER OF THE ROLLS.—There was a son and a daughter of the same person, an illegitimate son John, but a legitimate daughter Margaret. Could it therefore be understood that Elizabeth, the natural daughter of Elizabeth Abbott, single woman, meant John the natural son of Elizabeth Abbott, single woman, or Margaret the legitimate daughter of John Caddy? If the devisee was uncertain, the devise was void, and the gift passed to other persons. There was no Elizabeth the natural daughter of Elizabeth Abbott, single woman. Elizabeth was the name of neither claimant; the child designated was a natural daughter, and not John the natural son. The plaintiffs said, that neither were entitled. On behalf of the children of John, the words "natural" and "single woman" were relied on to shew that he was meant; but, on the other hand, it was desired that he should give effect to the word "daughter," and therefore Margaret the legitimate daughter was meant. Upon the first impression, it seemed that the devise was uncertain, but upon consideration the child of some person was intended. The will also appeared to contain some provisions and words which could not be rejected; the words "natural" and "single woman" seemed to afford a key; but on behalf of Margaret Austin it was said that the word "daughter" was the key.

The Court could not suppose that the testator meant nothing; if, therefore, something was meant, that would be made to bend to the intentions; and if, therefore, the word "child" was intended, and it meant John, the illegitimate child, then the bequest would be made operative; but if a daughter was meant, and that could be made out from the context, it must prevail; but it seemed clear that the testator intended that a child should take. If, therefore, it was necessary, he should consider whether the Court would not alter the sex.

Judgment postponed.

July 26.—The MASTER OF THE ROLLS.—The question reserved was, to whom a copyhold estate devised by the will of William Read belonged. There was no person answering the description in the gift; it was erroneous; the plaintiffs said that no evidence could be admitted to shew who was meant, and they insisted that the devise was void for uncertainty. On behalf of the children of John Abbott it was said that a son was meant; but Elizabeth Abbott afterwards became the wife of John Caddy; and it was argued, that Margaret, the legitimate daughter, was meant. It was in evidence that after the birth of the son the testator called to see Elizabeth Abbott; that he treated her with kindness; he knew that there was a natural child; he might not have known that it was a son; but except this

son, Elizabeth Abbott never had an illegitimate child. There was some evidence that the testator was kind to her after her marriage. By his will he had made provision for the children of William Bell, but he appeared in doubt as to the person who was the only natural child of Elizabeth Abbott. John was the only person to whom he could have had any relationship. The words in the will applied to no one; but under the circumstances he had come to the conclusion, though not without difficulty, that an illegitimate child was meant; and though there was a misdescription in the name and sex, still he thought it was a mistake, and ought not to make any difference. He should therefore declare that the children of John Abbott were entitled; but the costs of all parties must be paid out of the estate.

V.C. June 23. } EVANS *v.* CROSBIE.

Legacy—Residuary Legatee—Legacies charged upon Real Estate.

A testator gave and bequeathed all his real and personal estate to his trustees, upon trust, to sell and pay thereout certain legacies, and he made his brother, who was also one of his trustees, his residuary legatee; he then gave certain other legacies:—Held, that his brother took both the real and personal property after payment of all the legacies given by his will.

Malcolm Currie, the testator, in this cause, by his will, dated the 27th of February 1834, gave and bequeathed all his real and personal estate in possession, reversion, expectancy, or remainder, wheresoever situate in England (except his twelve shares in the Westminster Gas Company) to his brother Donald Currie, and his nephew Malcolm Douglas Crosbie, and their heirs, executors, administrators, and assigns, upon trust, that they, or the survivor of them, or the heirs or assigns of such survivor, should by sale, mortgage, or other disposition of his real estates, or any part thereof, pay to his married sister, Flora, the sum of 1,500*l.* for her separate use, and at her death the sum of 1,000*l.* to go to her daughter Eliza Crosbie, and 500*l.* to her son, the said Malcolm Douglas Crosbie. The testator then bequeathed to his brother James Currie, the sum of 1,000*l.*, to be laid out as he should think fit, and the interest to be received by him for his life, and at his death the said sum to be divided amongst his children, giving his son Malcolm Currie 100*l.* towards completing his medical education; and the testator left and bequeathed to his brother Donald Currie the sum of 2,000*l.*, and also to be his residuary legatee; then followed a bequest to his paternal sister, of the sum of 200*l.* for her absolute use and benefit; and the said twelve shares in the gas company he gave and bequeathed to his two grand-children for their sole and absolute use; and appointed his trustees executors of his will.

On the death of the testator, which happened in December 1836, his executors proved his will, and his personal property was sworn under 450*l.*, but his real estate was of considerable value. A question was now raised, whether the whole of the legacies were charged on his real estate, and whether, under the bequest to his brother, whom he appointed his residuary *legatee*, the undisposed of *real* property would pass.

Mr. Stuart and *Mr. Shapter*, for the assignees of the testator's heir-at-law, who had become a bankrupt, contended that they were entitled to the undisposed of freehold property of the testator.

Mr. Bethell and *Mr. Pearson*, for the representatives of the testator's brother, Donald Currie, contended that the real estate passed under the words "residuary legatee." It was evident that the testator intended to dispose of the whole of his estate, both real and personal, and he had used the term "residuary legatee," which was commonly used by persons in designating their residuary devisees as well as legatees. The following cases were cited—

Davenport v. *Coltman*, 9 Mee. & Wels. 481; s. c. 11 Law J. Rep. (N.S.) Exch. 114.

Day v. *Daveron*, 12 Sim. 201; s. c. 10 Law J. Rep. (N.S.) Chanc. 349.

Hope v. *Taylor*, 1 Burr. 268.

Pitman v. *Stevens*, 15 East, 505.

Mr. Stuart, in reply.

The VICE CHANCELLOR.—It rather seems to me that the cases of *Pitman* v. *Stevens*

and *Davenport* v. *Coltman* have this value, that they are important instances of the use of the word "legatee" as applicable in the minds of the parties to a disposition of real estate. It is true, that in these two cases the Court looked at the whole of the will, but they are proof that persons not instructed in law do use the term "legatee" as designating a person who is to take the land, and not merely the person who is to take land as contradistinguished from the person to take personalty. It is plain, that the term was used by persons who meant to describe those who were to take real as well as personal estate. No one can doubt, that in common parlance among those who are not lawyers, the term "residuary legatee" would mean the person to take real as well as personal property. As to this particular will, the testator commences by saying, "I give and bequeath all my real and personal estate in possession, reversion, expectancy, or remainder, wheresoever situate in England;" that shews that it is not intended as a disposition of all his property, as he might have other property not in England, that he thought might go to his heir-at-law: "(except my twelve shares in the Westminster Gas Company), unto my brother, and unto my nephew and their heirs, executors, administrators, and assigns, upon trust, that they or the survivor of them, or the heirs or assigns of such survivor, do and shall, as soon as conveniently may be, by and out of my personal estate, or by sale, mortgage, or other disposition of my real estate or any part thereof, pay, &c. unto my brother James Currie, the sum of 1,000*l.* to be laid out at eligible security, and the interest be paid to him during his life, and at his decease the said sum to be divided amongst the surviving children, giving his son Malcolm Currie 100*l.* towards completing his medical education." The testator then says, "I leave and bequeath unto my brother Donald Currie the sum of 2,000*l.*, and also to be my residuary legatee." That is very remarkable, because here, after appointing him residuary legatee, he gives his sister Catherine 200*l.* I point this out to shew the loose way in which the testator's intention was expressed. Now, as to the particular question I have to decide, it is plain the testator meant not merely that his sister Flora should take her legacy, but that his brother James and his other sister should take, even if there was a deficiency of personal estate. It must be supposed that he meant the residuary legatee should not be paid till after satisfaction of all the legacies. Now, suppose the word "legatee" had not been there, and it had stood, "I also leave him to be my residuary," that would mean residuary devisee; and how can you cut down the force of the word "residuary" merely because you find the word "legatee" joined with it? I think the natural construction is, that Donald should only take after payment of all the legatees, and should take everything. It appears to me that, according to the true construction of the will, that is the interpretation to be put upon it; and I am fortified in that opinion when I see, from the probate of the will, which I must look at in a questions relating to the personal estate, that the testator's personal estate is sworn under 450*l.*

L.C.
June 23, 26, 30; } BLAIR v. BROMLEY.
July 7.

Partners—Fraud—Liability of an Innocent Partner—Statute of Limitations.

The plaintiffs, the executors and trustees of a testator, in 1829, *employed A. & B, a firm of solicitors, to procure investments for the assets of their testator. A. wrote to the plaintiffs, naming one S. as a proposed mortgagor for* 4,500*l. on the security of freehold property, whereupon the plaintiffs forwarded to A. a cheque for* 4,500*l. to be so invested, which cheque was paid into a bank to the partnership account. The necessary mortgage-deeds were prepared, but S. afterwards declined to complete the transaction. In April* 1830, *A. wrote to the plaintiffs, giving a list of the securities upon which he alleged that the testator's assets were invested; and, amongst others, stated S.'s mortgage* 4,500*l.* 3*rd of October* 1829. *In* 1834, *A. & B. dissolved partnership, and the plaintiffs continued to employ A. as their solicitor, who regularly paid interest on the* 4,500*l. down to* 1841. *A. became bankrupt in* 1844, *and the plaintiffs then first discovered that the mortgage to S. had*

never been effected. On bill by the plaintiffs against B. to recover this sum,—Held, that the fraudulent representation of A. must be taken to be the act of the firm; and the money being received by the partnership, and lost to the plaintiffs in consequence of the fraud, which was first discovered within six years before the filing of the bill, the plaintiffs were entitled in equity to recover the money from B, the innocent partner, notwithstanding the dissolution of the partnership in 1834, *and the subsequent adoption of A. by the plaintiffs as their solicitor, the plaintiffs being without remedy at law, by reason of the Statute of Limitations.*

The particulars of this case and the judgment of Vice Chancellor Wigram, will be found reported *ante*, p. 105.

The defendant, Mr. J. W. Bromley, appealed from that decision.

The case was argued by—

Mr. Bethell, *Mr. Wood*, and *Mr. Prendergast*, for the plaintiffs; and

Mr. Romilly, *Mr. Bacon*, and *Mr. Craig*, for the appellant.

July 7.—The Lord Chancellor.—The payment of the 4,500*l.* into the hands of William Bromley and his partner, for the purpose of reinvestment, has been proved, and their liability in that respect is not disputed. Afterwards, W. Bromley, one of the partners, represented that he had invested the sum and paid the interest, and made the charge in the bill of costs for some of the expenses incident thereto. There is strong evidence that the defendant knew the transaction, and certainly he had ample means of knowing it. But neither of these considerations is necessary, for the duty of laying out the money was in the ordinary course of the business of the partnership, which they had undertaken; and, in that case, I agree with what is laid down by the Master of the Rolls, in *Sadler* v. *Lee* (1), that all the partners become liable for the several acts of each. In *Sadler* v. *Lee* the act was abusing the power which the owners of the fund had conferred on the several members of the firm by the power of attorney. In this case the act is representing that the 4,500*l.* had been invested in certain securities. What was the effect of such representation? Precisely the same as the actual existence of the fund upon the day on which stock was sold out. Now, in the present case, the misrepresentation continued until the fraud was discovered. The case, therefore, is the same as if, on that day, the fund, having been previously invested, had been called in and received by Messrs. Bromley; in which case there would have been no question as to the Statute of Limitations. Those who have a duty to perform, and who represent to those who are interested in the performance of it, that it has been observed, make themselves responsible for all the consequences of non-performance. Such was *Browne* v. *Southouse* (2), which was the case of an account. Such was *Evans* v. *Bicknell* (3), where Lord Eldon lays down the rule generally. In *Barwell* v. *Parker* (4), Lord Hardwicke applied the rule to the case of a scrivener, who had undertaken to lay out money. The principle, indeed, is deeply rooted in equitable jurisdiction, as in *Middleton* v. *Middleton* (5), and *Luttrell* v. *Olmius*, referred to in *Mestaer* v. *Gillespie* (6). What, then, is the nature of the liability which so arises from the misrepresentation? A guarantee that the parties, whose interest might be affected by the misrepresentation, shall be placed in the same situation as if the fact represented were true. The misrepresentation was fraudulently meant for a fraudulent purpose; but the consequence is merely single liability; and as one partner may certainly bind another as to any matter within the limits of their joint business, so he may, by an act which, though not constituting a contract by itself, is in equity considered as following all the circumstances of a contract. I am, therefore, of opinion, that William Bromley's partner, if he had had no knowledge or means of knowledge of misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiffs' right till the discovery of the fraud.

(1) 6 Beav. 330; s.c. 12 Law J. Rep. (N.S.) Chanc. 407.

(2) 3 Bro. C.C. 107.
(3) 6 Ves. 182.
(4) 2 Ves. sen. 364.
(5) 1 Jac. & Walk. 96.
(6) 11 Ves. 638.

What I have already stated, and the cases to which I have referred, make it unnecessary to say much on the objection that the plaintiffs' remedy, if any, is at law. In all these cases, the effect of the misrepresentation raises an equity to restore the parties deceived to as nearly as possible the situation in which, but for the misrepresentation, they would have stood, and for which damages in an action might be a very inadequate remedy. It is no objection to this equity that the facts may also support an action. It is more than 120 years since a similar objection was made in *Colt* v. *Woollaston* (7), and overruled.

I am, therefore, of opinion, that the decree of Vice Chancellor Wigram must be affirmed, with costs.

L.C. June 19. } JONES *v.* FAWCETT.

Baron and Feme — Married Woman — Change of next Friend—Costs.

Where a married woman applied for leave to substitute, as a new next friend, a person who was in such circumstances that the defendants' security for their costs would evidently be prejudiced, the Court refused to make the order.

In this suit, the plaintiff, who was a married woman, had obtained an order from Vice Chancellor Knight Bruce to substitute a new person as next friend.

A motion was now made on behalf of the defendants that that order might be discharged.

Mr. Teed and *Mr. Collins* supported the application, and read affidavits, which stated that the new next friend was in embarrassed or insolvent circumstances, and that consequently the security of the defendants for any costs which the next friend might be ordered to pay was really worthless.

Mr. Bell appeared for the plaintiff.

The following cases were cited:—

Lady Lawley v. *Halpen*, Bunb. 310.
Melling v. *Melling*, 4 Mad. 261.
Pennington v. *Alvin*, 1 Sim. & Stu. 264; s. c. 1 Law J. Rep. Chanc. 202.
Dowden v. *Hook*, 8 Beav. 399; s. c. 14 Law J. Rep. (N.S.) Chanc. 383.
Drinan v. *Mannix*, 3 Dr. & War. 154.

The LORD CHANCELLOR said, that, without expressing any opinion upon the question, whether a defendant, who was sued by a married woman, could raise an objection to the prosecution of the suit upon the ground that the next friend could not pay costs, he thought a defendant might object to the appointment of an improper person as next friend by way of substitution. The motion was not a matter of course: notice of it must be given to the defendant; and the Court would not allow a next friend to be changed without securing due protection for the interest of the defendant. The statements which were made on this motion clearly shewed that the proposed next friend was not a proper person, and that the defendants would not have any security for their costs if he were allowed to be appointed. His Lordship thought that the order of the Vice Chancellor must therefore be discharged.

The suit was afterwards continued in the name of the former next friend, upon an indemnity being given to him by the solicitor who acted for the plaintiff in the suit.

WIGRAM, V.C. June 29. } HUNT *v.* PEACOCK.

Parties—Representation.

Where a bill was filed by a party claiming to be entitled to three-fourths of an ascertained sum, it was held that the representative of the person entitled to the remaining one-fourth was a necessary party.

The will of Elizabeth Stacey, dated in January 1801, was as follows:—"I, Elizabeth Stacey, of &c., do make this my last will and testament—namely, being possessed of sundry leasehold houses in Goswell Street, in one lease, 300*l.* stock in the funds 3*l.* per cent. reduced, furniture, gold, plate, linen, china, and books; my desire is, that the same may be disposed of in the best manner by auction (stock excepted), and the amount thereof vested in the funds in the names of the executors hereafter

(7) 2 P. Wms. 154.

mentioned, for the benefit of my son William Stacey, and for his sole use, if he survives me three years; but if no application from him, then my will is, that the said property may be shared, share and share alike, between Ann Townsend (separate for herself,) Thomas Hunt, John Hookway, and Thomas Hosegrove; but, if any demise, the property to be divided amongst the survivors."

On the death of the testatrix, the executors satisfied the debts out of the produce of the sale of the leaseholds and the chattels mentioned in the will; but the 300*l.* stock, which was not required for the purposes of the will, was allowed to remain in the name of the testatrix. In 1811, the 300*l.* stock, with the accumulated dividends, having remained unclaimed for a period of ten years, was transferred into the names of the Commissioners for the reduction of the national debt. In 1846, the plaintiff having taken out administration to T. Hunt, J. Hookway, and T. Hosegrove, who had survived the testatrix for the period of three years, and had since died intestate, filed his bill, praying that, as the personal representative of Hunt, Hookway, and Hosegrove, he might be declared entitled to three fourth parts of the stock and the accumulated dividends thereon, and that the same might be ordered to be transferred to him accordingly. To this bill, the Commissioners for the reduction of the national debt, the Attorney General, and the personal representative of the surviving executor, were made parties. Ann Townsend, after surviving the testatrix for three years, also died intestate, and no representation had ever been taken out as to her. The bill alleged that William Stacey, the son, absconded from England shortly before the testatrix's death, and had never since been heard of. At the hearing of the cause,

Mr. Rolt and *Mr. Hargrave*, for the plaintiff, insisted that the prayer of the bill being for a distinct aliquot share of a definite sum, it was not necessary to bring before the Court a representative of Ann Townsend, as her interests would be unaffected by the decree—

Smith v. *Snow*, 3 Mad. 10.
Hutchinson v. *Townsend*, 2 Keen, 675; s.c. 6 Law J. Rep. (N.S.) Chanc. 13.
Perry v. *Knott*, 5 Beav. 293;

and that it was impossible for the plaintiff to obtain a representation to Ann Townsend, which would be effectual for the objects of the present suit.

Davis v. *Chanter*, 14 Sim. 212.
Clough v. *Bond*, 10 Sim. 564; s.c. 11 Law J. Rep. (N.S.) Chanc. 52.
Ellice v. *Goodson*, 2 Coll. 4.

Mr. Wray appeared for the Attorney General; and

Mr. Hallett, for the representative of the testatrix.

WIGRAM, V.C., after observing that *Perry* v. *Knott* had been questioned by the Lord Chancellor in a late case (1), and that *Davis* v. *Chanter* was then under appeal, was of opinion that the interest of Ann Townsend should be represented at the least by an administrator *ad litem;* and the cause was ordered to stand over, with liberty to amend the bill by adding parties.

L.C. July 2. } *In re* FOXHALL.

Power—1 Will. 4. c. 60.—Appointment of New Trustee.

Where a settlement contains a power to appoint new trustees in certain cases, but the power does not apply to circumstances which have taken place, the Court may appoint new trustees under the 1 Will. 4. c. 60.

This was a petition presented under the 1 Will. 4. c. 60. Certain leasehold tenements and other property had become vested in three trustees upon the trusts of a marriage settlement, and one of the trustees had become of unsound mind. A petition was presented by the husband and wife and the children of the marriage, the parties interested under the settlement, praying that a new trustee might be appointed, and that a proper person might be appointed to convey the property to the new trustee. By the settlement, a power of appointing new trustees was given to the three trustees therein named, and to the survivor of them

(1) See Lenaghar v. Smith, *ante*, p. 376.

One of the trustees having become of unsound mind, this power could not be exercised.

Mr. Riddell, in support of the petition, stated that, by the 22nd section of the act, power was given to the Court of Chancery to appoint new trustees in cases within the act, where the instrument creating the trust contained no power of appointment of new trustees. In this case the instrument did contain a power of appointing new trustees, but, under the circumstances, that power had become inoperative. He cited the case *In re Fauntleroy* (1), in which case the Vice Chancellor had held that when a power of appointing new trustees could not be exercised, from the circumstance of the surviving trustee, in whom such power had vested, having gone abroad, the Court, under the 22nd section, had authority to appoint new trustees.

The LORD CHANCELLOR expressed his approval of the view taken by the Vice Chancellor in that case, and said that the case where the power had become inoperative was tantamount in the contemplation of the act to a case where no power had been reserved by the instrument creating the trust; and his Lordship made the order according to the prayer of the petition.

L.C. June 2. } FERRABY *v.* HOBSON.

Trustee—Liability—Charge of Fraud—Neglect.

Where a bill charges a trustee with having fraudulently let trust property at an undervalue, to obtain personal benefit to himself, but the allegation of fraud is altogether disproved, the Court will not inquire whether a higher rent might not have been obtained, so as to charge the trustee for neglect or omission.

Where a trustee has let trust property at a proper rent, but it afterwards appears probable that either from the outlay of the tenant, or the rise of agricultural produce, a higher rent may be obtained, the trustee will not necessarily be charged with the difference between such higher rent and that which is actually received, although he does not immediately raise the rent.

The defendant Hobson and Mr. Brown, deceased, were trustees under the will of Mr. John Everatt. A farm called Burnham farm, which formed part of the trust estates, had been offered to a Mr. West at a rent of 408*l.* West declined to take it, and it was then let to a sister of Mr. Hobson at the rent of 408*l.* This was held to have been at that time a fair and proper amount. She held it at that rent till 1839, when the rent was raised to 480*l.* This suit was afterwards filed by a party beneficially interested in the property, charging that Hobson had continued to let his sister hold this farm at an undervalue for his own benefit; that the sister was merely his agent; and that a higher rent could have been procured without difficulty.

The bill sought to make the trustees personally liable for the difference between the 408*l.* and the higher rent which might have been obtained.

The cause was heard before Knight Bruce, V.C., who dismissed the bill against the trustees, so far as related to all charges of fraud or corruption; but his Honour not being satisfied whether a higher rent might not have been obtained if the trustees had not been guilty of negligence, required further information as to the value of the farm; and it was agreed that a Mr. Kirby, a land-surveyor, should certify as to the amount which ought to have been paid. Mr. Kirby was of opinion that 408*l.* was a proper rent for the year ending at Lady-day, 1836, but that a rent of 450*l.* should have been paid afterwards. The Vice Chancellor, under these circumstances, directed that, in taking the accounts, the trustees should be charged with the difference (42*l.* per annum), during the three years which elapsed between 1836 and 1839, when the higher rent of 480*l.* had commenced.

Mr. Hobson appealed from that decision.

Mr. Bacon and *Mr. Glasse* appeared for the appellant, and contended, that the case raised by the bill was grounded entirely upon the imputation of fraud, and that, as this case had completely failed, the plaintiff was not entitled to any secondary relief.

(1) 10 Sim. 252; s. c. 8 Law J. Rep. (N.S.) Chanc. 367.

If the plaintiff had charged the defendant with neglect of duty, he might have been able to meet that charge satisfactorily; but the point was not raised by the pleadings, and it ought not to be entertained by the Court.

Mr. Russell and *Mr. Leach*, for the respondent, contended, that the question was, whether too low a rent had not been received; the bill charged personal interest as the motive for accepting too low a rent, but whatever the inducement was, the trustee ought to be liable, if the fact was shewn that a larger sum ought to have been obtained.

The Lord Chancellor (without hearing any reply).—I am very clearly of opinion that this decree charges the trustees far beyond what any rule of this Court will justify. The decree directs that they shall be charged for three years for the extra rent, from Lady-day 1836 to Lady-day 1839, on the Burnham farm, which is the difference between a sum of 408*l.* and 540*l.* Now, the history of the transaction is this:—Two parties, Mr. Hobson and Mr. Brown, being trustees of the estate, found a tenant upon the farm, at the rent of 408*l.* Some attempt is made to shew that, from some private and personal reason, this tenant had been permitted to occupy the farm at a lower rent than the farm was worth. That case is entirely negatived by what is now admitted between the parties to be the fact, namely, that the rent which was reserved upon the new tenant (Mrs. Rawlins) coming into possession in 1835, was a fair rent: that is also confirmed, if it were necessary, by another party, West having refused to take it at that rent. That the estate, therefore, was fully and fairly rented at the time Mrs. Rawlins entered into possession in 1835, is beyond all dispute. So it went on up to the end of the year 1836. The party to whom it was agreed to refer the value of this land has reported that in that year the amount of 408*l.* was the proper rent. In October 1838, the trustees, being either called upon by those interested or being themselves of opinion that the rent was too low, gave the tenant notice to quit, which led to an investigation of the then value of the farm. It was valued at 450*l.* by one surveyor, 465*l.* by another, and 480*l.* by a third, and the trustees (this gentle one of them, who is supposed sacrificed the interest of his *cestu* for the benefit, not of his sister, b self,) instead of taking the lowe or the medium between the diffe ations, agreed with Mrs. Rawlin nant, that she should continue highest—a very hard measure, against the tenant, because the p is, that, the three valuations differ medium between the three woul most proper rent to be reserved. they acted upon the principle of g best they could for those for w were trustees, and they imposed t rent of 480*l.* upon Mrs. Rawlins t Now, when we look to the bill, we must look in order to see the which this case is stated and inten made out against the trustee, it i that from the death of the testator time Mrs. Rawlins, at all events, into possession, the land was let t low rent, which was known to be value, and that this was done, n benefit—that she was the mere tenant—but it was let at a non rent to Mrs. Rawlins, in order trustee might reap to himself the between the rent to be paid and t profits of the farm, or what the worth. It is stated, therefore, th circuitously, through the interv Mrs. Rawlins's name, made hims of the farm of which he was trus inadequate rent;—a case no dou if made out, would have been ut graceful to the party who practised ing that he was without any prin was endeavouring to appropriate t the property of others intrusted to The case as to that has entirely fail Vice Chancellor has dismissed parts of the bill which he consi making that case against the tru he has directed an inquiry to be m the value of the farm during th Mrs. Rawlins occupied it. T is, not stating anything which can the trustee in any improper deali own benefit about the rent, th interval between October 183 was the expiration of the first Mrs. Rawlins came into posses

during which period the surveyor reports the lower rent was paid, namely, 408*l.*, until it was ultimately raised in 1839, the rent actually paid (408*l.*) was not an adequate rent, that is to say, that more might have been obtained.

I find nothing in the bill which makes a charge against the trustee, or seeks to make him responsible under any such state of circumstances. It charges him personally, and if that had been proved it would have been adequate ground of charge of having appropriated to himself the benefit of the lease at a low rent, but it does not charge him with culpable neglect in having permitted the tenant to continue in the occupation of the farm which the tenant originally took at a fair rent, being only from year to year, at a lower rent than might have been obtained. If it had been charged without any imputation of personal corruption, it would have been a charge of mere neglect and omission. Without at all saying what circumstances might or might not have made the trustee liable under such a neglect of duty, it is quite obvious the case made by the plaintiffs is very different where the trustee is charged with personal corruption, and appropriating to himself the property of others. That might very well be an answer to such a case. It might be shewn, that although the land had increased in value, and the farm was worth more than it was let at, yet that it had become so from the expenditure of the tenant, and if the farm had become more valuable on account of the expenditure of the tenant after one, two, or three years of occupation, no man would say it was the duty of the trustee, or that it would have been justifiable for the trustee, to exact from the tenant the income derived from his own expenditure. Tenants, although they occupy from year to year, happily have sufficient confidence in those under whom they are holding, to lay out their money in a security, not a real security, but in the confidence that they will not be disturbed in the enjoyment of the fruits of their expenditure. It is quite impossible for the land of this country to be cultivated if that were not so, where so large a portion is occupied by the tenants without the security of a lease. If that case had been made against the trustee, the trustee might have found an answer to it. At all events his attention would have been drawn to it, and he would have been led into a different mode of conducting his defence from that he was led into by the species of charge alleged by the bill against him of personal corruption. If, therefore, the case had been one which upon the face of it would have required the interposition of the Court,—if the case was properly brought forward in the bill,—I should have been of opinion that the Court would have erred if it had upon such facts coming out upon the bill have fixed the trustees with liability for this neglect in not exacting the utmost value of the land. For although what Mr. Russell has referred to is to be found in the bill, it is quite clear, taking that passage with the previous pretence, and the prior case made in which the trustees are attempted to be charged, they have all reference to one state of facts.

The bill alleged that the trustee entered into this scheme with Mrs. Rawlins in order to get to himself the benefit between the whole value of the farm and the reserved rent. That is the charge made: that is the statement under which it is attempted to charge the trustee. Then the trustee is made to contend that the farm was not let at an undervalue, and that he, the trustee, had no interest in it, but that Mrs. Rawlins had the whole interest in it. That pretence is evidently with reference to the prior statement, namely, that it was a corrupt arrangement under which the trustee was to reserve to himself a personal advantage. Then the allegations as to the charge of that pretence, all following the same ground, are for the purpose of negativing that case so set up by the trustee. To be sure it is part of that proposition that the rent paid by Mrs. Rawlins was the full rent. If it was so, then, of course, there could be nothing left in which the trustee should profit, the proposition being that he let it to Mrs. Rawlins for less than the sufficient rent,—knowing it to be less than the sufficient rent; not by negligence, not by omission, but that it was done by him for the purpose of appropriating to himself the extra revenue which the farm might produce. All these allegations, pretences and charges are to be referred to some case attempted to be made, which has utterly failed upon the evidence.

The only remnant of a case is one not stated, nor charged: and the trustee was not, by the bill, sought to be affected by it.

I am of opinion, therefore, that that reference to Mr. Kirby was entirely out of the case, was not sanctioned by the pleading, and ought not, therefore, to have been made, as it could not properly be an ingredient on which in that state of the pleading the trustee could be charged. Then, independently of that, what are the facts appearing upon Mr. Kirby's certificate? Why, that from 1835 to 1836 all was right. That is admitted; he stated it, and the parties rely upon the certificate; therefore I must take that to be the fact. Up to 1836, therefore, there was nothing called for, nothing to be done. The trustee had the land let by him to a person, who, according to Mr. Kirby's statement, was paying a full rent for it; but circumstances might alter. Now I will suppose the case that the circumstances had altered, not with reference to anything done by the tenant, but by the change in the value of agricultural produce, which would make it worth while for the farmer to pay a higher rent than the proper rent reserved in 1835. If the trustee had been alive to the interest of those for whom he was acting, or if the land had been his own, he could not have interfered with the tenant's occupation until the autumn, and then he could only have given a notice to expire at Lady-day 1837, because he must give his notice to expire at the period when the tenancy commenced, and the tenancy being a Lady-day tenancy he could only in the autumn have given notice of putting an end to the tenancy in the subsequent month of March. But how does it appear that at that time there was sufficient evidence from the increased value of the land to make it his duty, or to make it justifiable for him to put an end to the tenancy, which up to that time had been a good and proper tenancy? It may be that subsequently the value of the land did increase, and it may appear now, it would have been desirable at least, that more money might have been obtained, if notice had been given at an earlier period; but there is nothing to shew that the trustee had that knowledge, or that the circumstances were such as to enable him to form a judgment that it was his duty to do so. I cannot think, therefore, that he was guilty of any breach of trust in not giving notice only six months after the variation of the price, supposing the change by the rise in the price of agricultural produce to have commenced in 1836. What means have I of ascertaining whether that temporary rise in the price of agricultural produce during these few months was such as to justify him in giving notice to the tenant to quit the farm? If it was not, then there was no delay, no improper dealing, no neglect in not giving notice for the following year; and if he did not give it to expire in March 1837, he could only give it to expire in March 1838. Then, in March 1838 he did not do it; but he did in 1840; and in 1840 he did give notice to determine the tenancy, for the purpose of obtaining a higher rent, which he did obtain. Now I put it to Mr. Russell to refer me to some authority to shew that a trustee, letting a farm at a proper rent, is personally to be charged to pay the difference between that rent, so properly reserved, and the rent which at some future period of the tenancy might have been obtained, because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable a party, if it was right and proper between landlord and tenant, to obtain a higher price from the tenant. No such case can be made, and no such case can exist on these facts. I do not speak of a case where there is great neglect—certainly not where there is a case of any abstinence of giving notice that can be referred to any favour shewn to the tenant, a case of gross neglect, although not founded upon fraud: yet it must be imputed that there is something like fraud before a trustee can be charged with that omission: there is no such case made out of personal corruption, or of preserving a personal benefit to himself: yet that is the whole case; that is all that is proved and all that is alleged. It may be that for a year earlier he might have given notice, or he might possibly two years earlier, but certainly not more than two years. It is impossible to carry it to a further period than two years before. I apprehend strictly speaking, it could not be carried further than one year before the time the report refers to, and to that time the report is acted upon, and I am called upon by the respondents to act upon it without any knowledge whatever what it was that gave rise to the improved value, whether it was

owing to the expenditure of the tenant on the farm, or from the rise in the market-price of agricultural produce; and that in a suit where that species of case is not alleged or proved. I am quite clear there is a miscarriage in this part of the case; and upon the evidence, as it appeared, the whole of the bill which charged the trustee, Mr. Hobson, with *devastavit*, and endeavoured to make him personally liable in respect of his dealing with this farm, ought to have been dismissed with costs.

(His Lordship then disposed of other costs, which related to a bill of discovery filed by the trustees.)

I alter the decree so far as relates to this Burnham farm, and include that in the part of the decree which dismisses the bill as against the trustee upon the alleged breaches of trust. So much of the bill as sought to impeach the conduct of Mr. Hobson, on the ground of breach of trust, must be dismissed, with costs.

I cannot part with this without saying, (it does not affect the proceedings in this cause, as here the case is explained,) that trustees who permit a near connexion to have anything to do with trust property expose themselves to great peril and lay themselves open, no doubt, to great suspicion. If there be no other fact to support the case, the circumstance of Mrs. Rawlins being the sister of the trustee would be a circumstance to be very much attended to, and bring the trustees into very great peril, because it naturally excites a suspicion which requires a strong case entirely to remove, if the facts do entirely remove it. Although I am satisfied he acted honestly, and that a right rent was obtained from Mrs. Rawlins when she came into possession, and that he was guilty of no neglect in permitting her to go on at the same rent until 1839, when he raised it, yet executors and trustees ought to be very cautious how they are dealing with property confided to their care, not to permit those with whom they may be supposed to have improper dealings to intervene in the execution of the trust.

The registrar very properly asks what I am to do with the certificate of Mr. Kirby. I find it is recited in the decree. If parties agree to refer to some third person, not an officer of the court, and not a witness, they must at all events take the case upon appeal as it stands, otherwise it will appear the Court is proceeding upon his opinion as evidence, which it clearly is not. If it were struck out of the decree, there would be nothing to support the decree. I think the better way will be to state in the decree that the parties had agreed to refer it to Mr. Kirby for his opinion. That would require, perhaps, now to be consented to at the bar, but if both counsel concur in that, the registrar will state it upon that authority, that both counsel having agreed to refer it to the opinion of Mr. Kirby: upon having that opinion, it was admitted.

With respect to the costs of this appeal, I cannot give Mr. Hobson the costs of the appeal. If I alter the decree, I never can give the costs; I may give him a personal remedy, so far as to give him costs as for an administration suit. So far as dealing with personal conduct is concerned, the order is to dismiss the bill as against the parties who have made those charges. I cannot give the costs of that out of the trust estate.

M.R.
July 6, 7, 8, 9 & 26. } KILNER *v.* LEECH.

Settlement — Construction — Next-of-Kin according to the Statute of Distribution.

By marriage settlement, certain funds were vested in trustees by the intended husband, in trust for himself for life, with remainder to his intended wife for life, remainder to the children of the marriage, and, if there should be no children, then in trust for such persons as the settlor should appoint, and in default of appointment, "in trust for the next-of-kin or personal representatives of the settlor, in a due course of administration, according to the Statute of Distribution." The marriage took effect, but there were no children, and the settlor died before his wife, having by his will disposed of his general personal estate, the residue of which he bequeathed to certain charities. The property of the wife was settled exactly in the same manner as that of the husband, and with a like ultimate limitation to her next-of-kin. On the death of the wife, her

personal representative claimed her share as widow in the fund settled by the husband, in opposition to the claims of the representative of his next-of-kin at his death, and also to the residuary legatees:—Held, that the next-of-kin were entitled to the fund under the settlement, to the exclusion of the widow; and that the fund did not pass by the will, and the charities were not entitled.

By a settlement, made on the marriage of John Allen with Lady Frances Turnour, bearing date the 5th of September 1806, the sum of 5,000*l.* consols belonging to Mr. Allen was vested by him in trustees (of whom John Leech, the defendant, was the survivor), in trust for himself for life; and, after his decease, in trust for Lady Frances; and, after the death of the survivor, in trust for the children of the marriage; and if there should be no children, then in trust for such persons as the settlor should appoint, and, in default of appointment, "in trust for the next-of-kin or personal representatives of the said John Allen, in a due course of administration, according to the Statute of Distributions." By the same settlement, certain property to which Lady Frances was entitled was vested in the same trustees on similar trusts, and with a like power of appointment in case of there being no children; and in default of appointment, there was a like limitation over to her next-of-kin or personal representatives in a due course of administration, according to the Statute of Distributions. There were no children of the marriage. On the 31st of May 1825 John Allen died, without having ever exercised his power. By his will he gave all his real and personal estate to his trustees upon certain trusts therein mentioned, and, in addition to other benefits, directed them out of the produce of the sale of his effects to pay over to his wife so much as would, with the income she would derive under their marriage settlement, make up a clear income of 300*l.* a year; and as to the residue of his estate, the testator directed his trustees to pay the same to certain charities therein mentioned. At John Allen's death Jane, the wife of Joseph Kilner, was his sole next-of-kin. Jane Kilner died in 1828, and her husband having taken out letters of administration to her estate, afterwards died, and thereupon the plaintiff, the son of Jane Kilner, took out administration to his mother. In 1832, after the death of Lady Frances Allen, an information of *The Attorney General* v. *Clarke* was filed at the relation of the treasurers of the charities for the administration of the testator's estate. In that suit the accounts had been taken and the fund apportioned, and the 5,000*l.* consols vested in the trustees, being treated as part of the residuary estate of the testator, had been ordered to be transferred to the charities, but before the order was carried into execution the plaintiff instituted the present suit, alleging that he had been hitherto ignorant of the purport of the settlement, and of his rights thereunder, and praying that he might be declared entitled to the 5,000*l.* The personal representative of Lady Frances, on the other hand, claimed to be entitled to her share in it, as the testator's widow; and the charities, the residuary legatees, also claimed, on the ground that the will operated as an appointment, or if it did not, that the clause in the settlement was void for uncertainty, and the fund passed by the testator's will as part of his general personal estate.

Mr. Turner and *Mr. Rogers*, for the plaintiff, the representative of the testator's next-of-kin, insisted that he was entitled to the fund; that Lady Frances was not entitled; and that it was clearly the intention of the parties in this case that the property settled by each should, in the event of there being no children, revert to his or her own family—

Bailey v. *Wright*, 18 Ves. 49.
Garrick v. *Lord Camden*, 14 Ibid. 372.
Phillips v. *Garth*, 3 Bro. C.C. 64.
Atkinson v. *Baker*, 4 Term Rep. 229.
Cholmondeley v. *Lord Ashburton*, 6 Beav. 86; s. c. 12 Law J. Rep. (N.S.) Chanc. 337.
Cotton v. *Cotton*, 2 Beav. 67; s. c. 8 Law J. Rep. (N.S.) Chanc. 349.
Worseley v. *Johnson*, 3 Atk. 758.

Mr. Tinney and *Mr. Malins*, for the charities, contended that the gift to the personal representatives ought to prevail—

Sanders v. *Franks*, 2 Mad. 147.
Daniel v. *Dudley*, 1 Phil. 1.

Smith v. *Dudley*, 9 Sim. 125.
Scott v. *Moore*, 14 Ibid. 35; s. c. 13 Law J. Rep. (N.S.) Chanc. 283.
Saberton v. *Skeels*, 1 Russ. & Myl. 587.
The Attorney General v. *Malkin*, 2 Phil. 64; s. c. *ante*, p. 99.
Jennings v. *Gallimore*, 3 Ves. 146.
Lowndes v. *Stone*, 4 Ves. 649, cited in *Elmsley* v. *Young*, 2 Myl. & K. 794; s. c. 4 Law J. Rep. (N.S.) Chanc. 200.
Godsal v. *Webb*, 2 Keen, 99; s. c. 7 Law J. Rep. (N.S.) Chanc. 103.
Withy v. *Mangles*, 4 Beav. 358; s. c. 10 Law J. Rep. (N.S.) Chanc. 391.
Allen v. *Thorp*, 7 Beav. 72; s. c. 13 Law J. Rep. (N.S.) Chanc. 5.
Marquis Cholmondely v. *Lord Clinton*, 2 Jac. & Walk. 83.
Watt v. *Watt*, 3 Ves. 244.

Mr. Roupell and *Mr. Miller*, for the executors.—It had been properly assumed, on behalf of the personal representatives of John Allen, that the charities were entitled to the fund—*Meryon* v. *Collett* (1).

Mr. Kindersley and *Mr. R. Palmer*, for the representatives of Lady Frances Allen, contended that the clause was not void for uncertainty, as if it were a limitation to A. or B, and that the will did not operate as an exercise of the power; that both the representative of the next-of-kin of Mr. Allen and his executors, in construing the clause in question, rejected some of the words, and then cited cases in support of views, to which they were only applicable when the words were so left out; but that the construction contended for on the part of Lady Frances neither omitted, transposed, nor gave a strained effect to any of the words, and was in accordance with what would be expected to be the intention of the parties in such a case; in short, that it meant persons who, under the Statute of Distributions, and in a due course of administration under that statute, would be entitled to the personal estate of John Allen; and if so, the widow would be entitled to a share.

Pearce v. *Vincent*, 2 Keen, 230, and 2 Myl. & K. 800; s. c. 7 Law J. Rep. (N.S.) Chanc. 285.
Jenkins v. *Gower*, 2 Coll. 537.
Atkinson v. *Baker*, 4 Term Rep. 229.

(1) 8 Beav. 386; s. c. 14 Law J. Rep. (N.S.) Chanc. 369.

Nichols v. *Savage*, referred to in *Bailey* v. *Wright*, 18 Ves. 52.
Price v. *Strange*, 6 Mad. 159.
Bridge v. *Abbot*, 3 Bro. C.C. 224.
Walter v. *Makin*, 6 Sim. 148; s. c. 2 Law J. Rep. (N.S.) Chanc. 173.
Booth v. *Vicars*, 1 Coll. 6; s. c. 13 Law J. Rep. (N.S.) Chanc. 147.
Baines v. *Ottey*, 1 Myl. & K. 465; s. c. 1 Law J. Rep. (N.S.) Chanc. 210.
Robinson v. *Smith*, 6 Sim. 47; s. c. 2 Law J. Rep. (N.S.) Chanc. 76.
Minter v. *Wraith*, 13 Sim. 52.
Seifferth v. *Badham*, 9 Beav. 370; s. c. 15 Law J. Rep. (N.S.) Chanc. 345.

Mr. Wray, for the Attorney General.

Mr. Turner, in reply, said he had examined the decree in *Cotton* v. *Cotton;* and in *Reg. Lib.* (1838), (A) fol. 1509, it stood thus:—"His Lordship doth declare that the parties who would have been entitled under the Statute of Distributions to the personal estate of Joseph Cotton the younger, the testator in the pleadings in this cause named, if he had died intestate, are entitled to the sum of 2,243*l.* 5*s.* 2*d.*, bequeathed by John Lloyd, the testator in the petition mentioned, to the said Joseph Cotton or his legal representatives. And it appearing by the proceedings in the cause that he left Ann Maria Cotton, his widow, and the plaintiffs and defendants Joseph Alexander Cotton and his nine children him surviving, his Lordship doth declare that the said Ann Maria Cotton, widow, is entitled to one-third part of the said sum of 2,243*l.* 5*s.* 2*d.*, and that the said nine children are entitled to the two third parts thereof in equal shares."

July 26.—The MASTER OF THE ROLLS said that the question for consideration was the effect of the ultimate limitation in the settlement. Three claims had been set up: the first was that of the executors, who claimed the fund as part of the testator's general personal estate; the second was that of the plaintiff, as representative of the sole next-of-kin of the testator at his death; and the third was made by the personal representative of Lady Frances Allen on the ground that she was entitled to a share of the fund as one of those to whom distribution was to be made under the statute, as in case of intestacy. The first claim was clearly untenable: the fund did not form

part of the testator's general personal estate nor pass by his will. The only question, therefore, was, as to whether the wife was entitled to a share of the fund in the events which had happened; and he was of opinion that she was not. He thought that on the construction of the settlement, looking to the frame and the whole scope of it, the intention of the parties was, that if there should be no appointment, and in default of issue, the sum in question should revert to the testator's family, and in like manner that the wife's fortune should revert to her family. It was, therefore, necessary that each should have the use of the other's money during life, but resigning all interest therein at his or her death. The words "next-of-kin" did not include the wife; but it was argued that "personal representatives" might, and that each might have their effect if the wife were let in as well as the plaintiff. But without saying what might be the import of those words in other cases, in this case such a construction was at variance with the general intention apparent on the face of the instrument. The case was argued as if the words "personal representatives" meant "legal representatives," but they did not necessarily do so, and he could not give them such a technical force in this case. Personal representatives did not include the husband, and they could not include the wife. The fund, therefore, belonged to the plaintiff, exclusive of the wife's claim. Costs would be given to all parties, as in the case of an administration suit.

M.R. July 27, 28. } BERROW *v.* MORRIS.

Bill — Supplemental Bill — Extending Decree in Original Suit.

Where a case of wilful default by an executor is charged by a bill, and stated in the answer of a defendant, a co-defendant, notwithstanding the decree for the common accounts in the original suit, will be entitled to file a supplemental bill, and to have inquiries directed whether there had been any wilful default.

A suit was instituted by residuary legatees against the sole executor of a testator, and against an annuitant, for the administration of the testator's estate, the whole of which was made subject to the annuity. The bill charged the executor with want of diligence, and with wilful default, and that loss had been sustained in consequence of such wilful default, and it asked for the consequential relief. By his answer the executor stated facts which shewed that there were grounds for the charges in the bill, but no evidence was brought forward by the plaintiffs to support the charges, and a decree for the common accounts alone was made. The prosecution of the decree having been committed to the annuitant, who was a defendant in the original suit, it was ascertained that there had been a loss, and that there was a case for inquiry; and the executor having died, the annuitant filed a supplemental bill against his executors, charging the executor with wilful default, and that at the time of the decree there was a case for inquiry, and praying the consequent relief: —Held, that the annuitant had no means of obtaining relief against the executor at the hearing, and that the supplemental bill was properly filed.

Richard Berrow, by his will, directed payment of his debts, and gave all his property to William Hedges and Joseph Morris, upon trust, to collect debts outstanding at the time of his death, and as the same should be received to pay thereout unto his wife Sarah Berrow, for life, or so long as she should continue his widow, an annuity of 50*l.*, by equal quarterly payments, the first to commence on the first quarter day next after his death; and, upon further trust, to invest the surplus (if any), after payment of the said annuity, as the same should be received by them and amount to a competent sum, in some or one of the public stocks or funds in their joint names; and after the death or second marriage of the said S. Berrow, upon trust, to divide the said annuity, and the estate and effects producing the same, together with all the trust stocks, funds, and securities, and all the accumulations, interest, and dividends, and the rest and residue of his estate and effects unto and amongst the children of his brother; and he appointed W. Hedges and J. Morris his executors.

In 1824 the testator died, and in 18[illegible] J. Morris alone proved his will. The re[illegible]

[illegible] legatees filed their bill against J. Morris and S. Barrow: it charged J. Morris with not having used due diligence in getting in the testator's estate, and that loss had been sustained by his wilful default, and it prayed for an account, and for the administration of the testator's estate, insisting that J. Morris might have recovered the debt by his wilful default. J. Morris in his answer stated that the testator was at the time of his death entitled to a mortgage debt of [illegible], secured upon a leasehold house in Bond Street, belonging to Mrs. Romann, the mortgagee, which was abundantly sufficient to pay off the mortgage debt. And he also stated that the testator was entitled to a debt of £[illegible] from Mrs. Romann, secured by her promissory note, and that considerable delay and expense was incurred before payment of the mortgage debt could be obtained, as Mrs. Romann had become [illegible] amount mind, and before he could recover the debt he was in 1838 compelled to apply for a commission of lunacy, under which Mrs. Romann was found a lunatic, and he was appointed her committee, and sold the leasehold house, which did not produce sufficient money to satisfy what was due for principal and interest on the mortgage, and that the £[illegible] due on the promissory note was never recovered.

The plaintiffs in the above suit went into evidence in support of their charges against J. Morris, but he died before the hearing, leaving Joseph Barrow Morris, Isaac Henry Morris, and Thomas Wilson, his executors, against whom the suit revived. In July 1843 the cause was heard, and a decree was made for taking the accounts of the testator's estate, but no relief was granted upon the charges made against J. Morris of want of diligence and default in getting in the testator's [illegible]. During the proceedings in the Master's office the [illegible] of the cause died in the [illegible]; it then appeared by accounts and the inquiries taken before the Master that it was probable that the assets would be insufficient to answer [illegible]. S. Barrow said that this arising out of J. Morris's [illegible] default in failing to recover the mortgage and promissory note, and that it [illegible] for the Master, when [illegible] of July 1843 to enquire whether J. Morris was or was not guilty of any wilful default, and that the plaintiff and the other parties interested in the testator's estate were entitled to have an inquiry as to the loss sustained in consequence of J. Morris not having duly realized the amount due on the mortgage and promissory note; and it prayed that the suit might be taken to be supplemental to the former suit of *Barrow v. Morris*, and that the plaintiff might have the benefit of the proceedings had therein, and that it might be referred to the Master to take an account of all the loss sustained by the testator's estate in consequence of J. Morris having failed to realize the mortgage debt and the sum due on the promissory note, and that the same might be made good out of his estate, and that the Master might be directed to report on the matters now asked for, together with the matters referred to him by the decree of July 1843. Evidence was entered into to show that the debts in question might, with due diligence, have been realized. W. H. Morris, one of the executors of J. Morris, by his answer, submitted that the suit was altogether irregular and improper, as an attempt by supplemental bill, without leave of the Court, to obtain relief which differed from and was at variance with the decree in the original cause, no new facts having arisen since the original suit, and nothing having been discovered which did not appear on the pleadings and in the proceedings in the original suit: and the defendant insisted upon the decree and proceedings in the original suit, in bar to the relief asked.

Mr. Rogers and *Mr. Eddowes*, for the plaintiff.—The object of the suit was to obtain further inquiries to a decree which had been made: the testatrix's legatees had no immediate interest in the estate, and though Mrs. Barrow was a defendant, she had not the conduct of the cause: the decree was made by consent, but it omitted to direct the most material inquiries. It is therefore open to Mrs. Barrow, who has now obtained the conduct of the cause, and may become aware of the facts in the Master's office, to file a supplemental bill to obtain the relief now asked for, which was consistent with that sought by the original suit—*Hudson v. Bell*[1].

[1] 1 Phil. [illegible], s. c. 12 Law J. Exp. [illegible], Cases in.

Mr. Kindersley and *Mr. Walford*, for the executors of J. Morris.—The decree asked for might have been obtained in the original suit, and ought not now to be made. This was only a means of obtaining additional relief—*Shepherd* v. *Towgood* (2).

Mr. Martindale and *Mr. Piggott*, for other defendants.

Parker v. *Constable*, 13 Sim. 536; s. c. 15 Law J. Rep. (N.S.) Chanc. 16. was cited.

The MASTER OF THE ROLLS.—The original bill was filed by the residuary legatees against J. Morris, the sole acting executor under the will of Richard Berrow, and the present plaintiff as a party interested in the testator's estate, in respect of her annuity. The bill charged the defendant Morris with wilful default, and that he might have received a portion of the assets, which by his neglect he did not receive. Mr. Morris stated in his answer circumstances which warranted that charge. A portion of the testator's estate consisted of a mortgage for 1,000*l.*, secured only on a leasehold house; and 388*l.*, another portion, was secured only by a promissory note. The cause came on, and was heard as a short cause. No evidence was entered into by the plaintiffs, and a decree was taken for the common account against the executor. The charge of wilful default being at that time abandoned by the plaintiffs, they could not afterwards have availed themselves of it without very special circumstances indeed. The decree does not appear to have been objected to by the defendant, who is the plaintiff in this cause. It is stated that her solicitor, before the hearing, signed the minutes of the decree for the adoption of the Court. Under this decree the cause was taken into the Master's office. It was not prosecuted with due diligence, and the result was, that the prosecution was committed to the plaintiff. The Master made his report in 1845. The plaintiff says, that having the prosecution of the decree, she found out that there was a case made on the record at the time of the decree, which would have entitled the plaintiffs to the decree asked for by the bill, charging the defendant with wilful default. Upon this discovery the plaintiff filed the present bill in May 1845, charging the wilful default which was charged in the original bill, and that at the time of the decree there was a case for the decree asked for by that bill, and praying that the present bill might be taken as supplemental to the former suit, and that the plaintiff might have the benefit of that suit and the proceedings in it; and that there might be the inquiry asked for by the original bill, and not taken at the hearing. Supposing the facts to be as alleged, they were evidence of wilful default, and being admitted by the answer, there is no doubt that if asked for there would have been an inquiry, in order that the person to be charged might have an opportunity to offer an explanation. The plaintiff in this suit could not, under the circumstances of the case, have obtained that decree against the will of the plaintiffs. She knew the allegations contained in the bill, and that there was no evidence in the cause relating to this charge, but she did not know, at least could not be presumed to know, what was contained in the answer of her co-defendant, and which answer constituted the whole of the evidence of the plaintiffs in the cause. It is clear, therefore, that if she had desired to have had the decree asked for by the bill, the answer would have been, Where is the evidence in the cause? She had no such evidence, and was not entitled to read one word of the answer of her co-defendant. It does not appear, therefore, that she had any means of asking for relief in the cause not asked for by the plaintiffs. And supposing it to be true that there were assets of the testator lost by the wilful default of the executor, and that she could not on that account obtain payment of her annuity, it could not be supposed that there were no means for her to obtain redress. The only question is, whether by filing a supplemental bill she has taken the proper course. It was objected to, because it was said to be a supplemental bill in the nature of a bill of review, which ought not to be filed without the leave of the Court, and that it would be inconvenient if every defendant were allowed to file a supplemental bill. There is something plausible in this argument, but the giving relief on this bill would not lead to that inconvenience, because every de-

(2) Turn. & Russ. 379.

dant is not in the position of the plaintiff in this cause. The relief asked for is necessarily connected with that given by the decree, and it would be idle to have an original suit not taken in connexion with the other suit, unless the parties desired to do that which would be very unreasonable, to rip up the decree in the other suit and the accounts taken under it. If the cases cited are consistent with the relief asked for, there can be no hesitation in making the decree asked for; and if relief cannot be given in this form, I shall give the plaintiff leave to file another bill which may be more effective.

July 28.—The MASTER OF THE ROLLS said he had read the pleadings and the cases cited, and he thought the bill was not objectionable in point of form: he should, therefore, make the decree in the form adopted in *Shepherd* v. *Towgood*. The decree ought to commence with words similar to those used in the original decree, and the inquiries should be confined to the 1,000*l.* and 388*l.*

M.R.
July 21, 22, 23 & 28. } EGG *v.* DEVEY.

Trust, Breach of—Condition not to dispute—Special Accounts and Inquiries—Lapse of Time—Acquiescence.

A. B, an executor of his father's will, sold out certain stock, and employed it in his business; but he afterwards replaced it in full. C. D, his sister, was entitled to a life interest in part of the stock, with remainder to such of her children as should be living at her decease. On the death of A. B, E. F, a son of C. D, threatened to take proceedings against the representatives of A. B, to make his estate liable for the breach of trust in so using the stock, whereupon C. D, who by her will had given certain benefits to E. F, made a codicil thereto, and thereby declared her full approbation of A. B.'s conduct as regarded the trusts of his father's will, and prohibited every person entitled to any benefit under her will from setting up any claim on account of any error or irregularity in the execution of those trusts; and she authorized her executors and trustees to give and receive such releases and discharges as might be proper for effecting the objects of such declaration and prohibition. On the death of C. D, E. F. received the legacy given him by his mother, and signed the ordinary legacy receipt for it, but did not give a release, and afterwards instituted the threatened suit:—Held, that having accepted the gift under his mother's will, he was only entitled to have the common account, but not to make any claim against the estate of A. B. in respect of the employment of his testator's assets in his trade; and so much of the bill as sought to establish that claim was dismissed with costs.

John Daniel Salamon, by his will, bearing date the 15th of February 1793, directed his trustees and executors to permit his wife to use his furniture, plate and jewels during her life, and after her decease to divide the same equally among his four children, John Salamon, Mary Ann Egg, Catherine Salamon, and Charlotte Salamon. The testator also gave his wife a legacy of 50*l.*, and bequeathed 2,000*l.* to his trustees upon trust, to invest the same, and pay the income thereof to his wife for life, and after her decease to divide the principal among his said children; and if any of them should be then dead, in trust, to pay his or her share equally to such of them as should be then living. The testator then bequeathed 700*l.* to his son John absolutely on attaining a given age, the income in the mean time to be applied for his support and education; and he also bequeathed 600*l.* to his trustees upon trust to invest the same and pay the interest thereof to his son John for life, and after his decease to divide the same among such of his children as should attain twenty-one. The testator then directed his said trustees to invest so much of the proceeds of his estate and effects as would produce the yearly sum of 54*l.* 12*s.*, and to pay the said yearly sum to his said daughter Mary Ann Egg during her lifetime for her separate use, and after her decease to pay the income of 600*l.*, part of the sum so invested, for the support and education of such of her children as should be living at her decease till they should attain twenty-one; and when they should attain twenty-one, to divide the principal sum of 600*l.* equally between them, and the remaining part of the said sum so directed to be invested, the

testator declared should fall into the general residue of his estate. The testator then made provision for his two daughters Catherine and Charlotte, and their children, precisely as he had done for his son John, and declared that any of his children who should attempt to part with their interest should thereby forfeit all benefit under his will; and as to the residue of his estate, the testator gave one-fourth part thereof to his trustees upon trust for Mrs. Egg for life, and then for such of her children as should be living at her death, in the same manner as the gift of the 600*l.*; and the other three-fourths he directed his trustees to divide among his other three children on their attaining twenty-one; and he thereby, and by a codicil thereto, appointed Philip King, Godfrey Major and John Salamon his executors.

The testator died soon after, and his executors duly proved his will. P. King and G. Major took no part in the execution of the trusts of the will, and they died, leaving J. Salamon the acting executor surviving, who, having duly ascertained the amount of the estate, in the year 1798, entered the particulars thereof in the executorship books.

In 1811, J. Salamon entered into partnership with Thomas Fry, in Little Eastcheap, in the business of dealers in refined sugars, which they carried on together till the year 1818, when J. Salamon retired, and the business was thereafter carried on by T. Fry and George Frederick Egg, a nephew of J. Salamon, till the death of the latter in 1834. In 1811, and at various times afterwards, J. Salamon sold out portions of the trust fund, and invested it in his business, but continued to pay interest for the same to the parties entitled, and ultimately replaced the entire amount.

Mary Ann Salamon intermarried with Durs Egg, and had six children, of whom only three, viz., the plaintiff Henry Durs Egg, John Egg, and Ann Egg, afterwards Ann Devey, survived her.

J. Salamon died, without having been married, on the 6th of September 1840, having, by his will, made several bequests, and, among others, one of 100*l.* to the plaintiff: he then gave the residue of his estate to his sister Charlotte, and appointed the defendants, F. N. Devey, F. W. Devey, and the said C. Salamon, executor executrix thereof. J. Salamon's estate considerable, and the legacy of the tiff being small, he was dissatisfied in a letter to his aunt Charlotte, the 9th of May 1842, he threaten take proceedings against the repre tives of J. Salamon, to make his liable for the breach of trust committ him; whereupon his mother, who had her will, and left the residue of her equally between the plaintiff and his b John Egg, made a codicil thereto declared her approbation of the m in which the trusts of her father's had been executed by J. Salamon, prohibited every person entitled to benefit under her will from setting u claim on account of any error, irregul or impropriety in the execution o trusts; and she authorized her exe and trustees to give and require from person entitled, such releases and disch as might be thought proper to effe objects of the declaration and prohibit

Mrs. Egg died on the 12th of Nov 1843, and the defendants, F. N. I and F. W. Devey, became her legal sonal representatives. The plaintiff, ing the contents of the will and codicil, several letters to F. N. Devey, ex ing his dissatisfaction, and on being to receive the legacy, and give the req release, on the 14th of November 1844, taking time to consider, and Mr. D for the purpose of saving expense, con ing to take the common legacy recei accepted payment of his legacy unde mother's will. After various commu tions between the parties, the plaintiff his bill on the 2nd of May 1845, pr for an account of the estate of J. D. mon, and that the balance from tin time in the hands of J. Salamon mig ascertained, and that he might be ch with interest thereon, and that yearly might be made, and that an account be taken of the monies belonging t estate of J. D. Salamon, employed Salamon in his trade, and that J. Salan estate might be charged with the prof interest at 5*l.* per cent., &c.

The plaintiff alleged that since the of his mother, and the falling into posse of his interest under his grandfather's

he had discovered the breaches of trust committed by J. Salamon, and that the condition expressed in his mother's will was in no way a bar to his seeking redress in respect thereof, and that he was not bound as he had not signed a release. The defendants, on the other hand, insisted that he was all along, from the year 1818, perfectly aware of the breaches of trust; that he was a clerk to his brother G. F. Egg and his partner Thomas Fry, during their partnership, and had access to the books of the partnership, and must have seen the entries therein: but that even if that were not so, his own letters to members of the family abundantly proved that he knew of the breaches of trust very many years before his uncle's death, and certainly from and after the year 1834, for he stated in one letter that his brother George told him of them, but he never spoke of the matter to his uncle, but constantly endeavoured to keep on terms with him till his death, when on finding his legacy so small he resolved to institute the suit. They insisted, therefore, that he was precluded by lapse of time and acquiescence from prosecuting his suit in so far as related to the breaches of trust, or if not, that having accepted the legacy under his mother's will, he could not so proceed.

Mr. Turner and *Mr. J. H. Palmer* appeared on behalf of the plaintiff.

Knatchbull v. *Fearnhead*, 3 Myl. & Cr. 122.
Hay v. *Bowen*, 5 Beav. 610; s. c. 12 Law J. Rep. (N.S.) Chanc. 78.
Mehrtens v. *Andrews*, 3 Beav. 72—76.
Wedderburn v. *Wedderburn*, 2 K. 722; s. c. 8 Law J. Rep. (N.S.) Chanc. 177.
Docker v. *Somes*, 2 Myl. & K. 655; s. c. 3 Law J. Rep. (N.S.) Chanc. 200.
Taylor v. *Popham*, 1 Bro. C.C. 168.
Portlock v. *Gardner*, 1 Hare, 594; s. c. 11 Law J. Rep. (N.S.) Chanc. 313.

Mr. Kindersley and *Mr. Hallett*, for the defendants.

Willett v. *Blanford*, 1 Hare, 253; s. c. 11 Law J. Rep. (N.S.) Chanc. 182.
Jones v. *Howells*, 2 Hare, 342; s. c. 12 Law J. Rep. (N.S.) Chanc. 365.

Mr. Turner, in reply.

The Master of the Rolls. — It is a mere presumption because the plaintiff was a clerk in the business carried on in Eastcheap, and probably had access to the books, that he knew of the employment of the trust money in the trade; but it has been so stated on his part, and there is ground for presuming that he knew of the circumstance as early as the year 1834. It has been said that as his interest was only contingent, it was not incumbent upon him to file a bill to rectify the matter: at that time it might have been very hazardous. I have been reminded of a decision of my own, where a person filed a bill in respect of a contingent interest, which ceased before the suit came to a hearing, and he was compelled to pay the costs. It might have been so here, unless there was something to take it out of what may be considered a general rule. But knowing these matters, and the person whom he intended to charge, or whose estate perhaps he intended to charge, being at that time alive, and continuing alive for the space of six years afterwards, he communicated with him, not finding fault with what was done, but addressing him in terms of regard and friendship, hoping to derive benefit from it. That was the state of things when the executor died on the 6th of September 1840. No complaint was immediately made, but during the lifetime of his mother he wrote a letter to his aunt Charlotte Salamon, the sister of John, dated the 9th of May 1842, disclosing his views. Eight days afterwards his mother makes a codicil to her will, stating herself to have been satisfied with the mode in which John Salamon conducted the business of the testator's estate, and prohibited in terms any fault being found with the execution of the trusts of his will, and she desired that the executor should require a release and discharge for effectuating the object of the declaration. She died in the month of November 1843, and the codicil was immediately communicated to the plaintiff. After the case of *Knatchbull* v. *Fearnhead*, it will not do for an executor to say to a person claiming something out of the estate, "If you do not file your bill within a limited time, I shall distribute the estate." It will not do for him to say he will be freed from liability by giving such advice. An executor to be quite safe must see the estate administered in this court.

With a view to save expense, the executor omitted to take a release, and in consequence the plaintiff claims a right to prosecute this suit. But the plaintiff, with a full knowledge of the opinion of the executors, from the advice they had received, and after obtaining time to enable him to take advice, does in November receive the gift made to him by his mother's will, and signs a receipt for it; and the question is not so much whether or not the prohibition taken by itself would have had the operation which is attributed to it, but whether his receipt for the residue, knowing the condition in the codicil, is not to have the effect which is put upon it—not the effect of ousting him from the right of suit—not the effect of saying that he shall be entitled to no account here—but whether having deliberately accepted that money, he ought not to waive that portion of the claim which he has endeavoured to enforce, after so great a lapse of time. If the greatest breach of trust had been committed, it is not a matter of course that there should be an account of profits. It might be, that the only thing to be required would be interest, which has been made an alternative claim upon this demand. The question, however, is, whether the plaintiff is to be in the same situation as he would have been before he signed the receipt. At any rate, there must be an account, but whether there are to be any special directions must require consideration before I can come to a conclusion.

July 28.—The MASTER OF THE ROLLS.—In this case I have considered the codicil of Mrs. Mary Ann Egg, and the several cases which were cited in the course of the argument, and also the case of *Tattersall* v. *Howell* (1), and I am of opinion that the codicil sufficiently expresses a condition to which this Court will give effect, and that the plaintiff having accepted the benefit given to him by the will, is bound by the condition, and is not under the circumstances of this case entitled to make any claim against the estate of John Salamon, in respect of his employing the assets of John Daniel Salamon in the trade which he carried on from 1811 to 1818. I therefore think it right to make a decree for the common account to be taken of the estate of John Daniel Salamon I dismiss with costs so much of this seeks for special accounts and inquiri

(1) 2 Mer. 26.

M.R. 1846. Nov. 18. 1847. Aug. 5. } OTTLEY *v.* GRAY.

Insurance—Deposit with Notice signment—Receipt of Executor—C Abatement.

W. C. O. deposited a policy of ass upon his life with W. O. to secure and any further advances. Notice deposit was given to the directors assurance office; W. C. O. afterwar signed the policy to W. O, and appoint his attorney to receive what should b upon the policy, and declared that it not be necessary for the assurance of inquire if any money was due to the nee, and it also empowered W. O. t receipts for the money. On the dece W. C. O. the assurance office refused the policy; they alleged that the sig of the executor to any receipt for the was requisite, and they insisted that h a necessary party to the bill; he was a ingly made a party to the bill, but disc any interest in the money:—Held, th plaintiff was entitled to receive the and that the company was bound to p whole sum assured, with interest at 4 cent. from three months after the dece W. C. O, but without costs, there bei substantial object in view by either except to fix the other with costs.

This bill was filed by Warner C against Robert Alexander Gray, W Cripps, and the Hon. John Chetwynd bot, three of the directors of the Pro Life Association, and against Henry O praying that the directors might be or to pay to the plaintiff the sum of 499 sured by a policy dated the 27th of Ja 1836, together with any bonus payal respect thereof, with interest from th piration of three calendar months afte death of William Campbell Ottley, a costs of the suit.

On the 27th of January 1836 the directors of the association granted to him a policy of assurance, and in consideration of a premium of 12*l.* 1*s.* 8*d.*, which was paid, they covenanted with him to pay, out of the funds of the company, to his executors, administrators, or assigns, within three calendar months after proof satisfactory to the directors should have been given of his death, the sum of 499*l.*

William Campbell Ottley was indebted to the plaintiff Warner Ottley in a considerable sum of money, and having, besides the policy granted by the Protector Life Association for 499*l.*, effected another policy of assurance, dated the 13th day of January 1836, with the National Life Assurance Society for the sum of 500*l.*, he deposited the two policies with the plaintiff as a security for the payment of the debt, and signed a letter or memorandum dated the 28th of January 1836, in which it was stated that he had deposited the policies as such security; and that when requested, he, his executors, administrators, or assigns would assign the two policies to the plaintiff. In February 1842 the plaintiff, through his solicitor, gave notice to the directors of the company of the deposit having been made to secure monies advanced by the plaintiff to W. C. Ottley.

By an indenture, dated the 29th of April 1842, and made between W. C. Ottley of the first part, and the plaintiff of the other part, W. C. Ottley assigned the two policies to the plaintiff Warner Ottley absolutely, upon trust, in case of payment of the debt and interest, that the policies should be redelivered, and that the assignment thereby made should become void, and gave him full authority, in the name of W. C. Ottley, his executors and administrators, to ask, demand, sue for, recover, and give acquittances and discharges in writing, for the sums of 500*l.* and 499*l.*, and other monies thereby assigned, and thereby declared that no inquiry whatever should be made by the said societies or companies, or either of them, or other person or persons liable to pay the monies assured by the said policies respectively, or either of them, as to whether any monies remained due on the security of the said indenture to the plaintiff, his executors, administrators, or assigns, it being the intention of the parties thereto that the receipts and discharges of the plaintiff, his executors, administrators, or assigns should, whether there should or should not be any monies remaining due on the said indenture, alone be effectual. The plaintiff also was empowered to sell the policies in case of default, and to give receipts for the purchase-monies.

W. C. Ottley died on the 9th of May 1843, having, by his will, dated the 8th of May 1843, appointed his wife Louisa, and his brothers, Henry Ottley and Warner Buckingham Ottley, his executors; but H. Ottley alone proved the will.

At the time of the death of W. C. Ottley, a sum of 1,600*l.* and upwards was due to the plaintiff upon his security, with a considerable arrear of interest.

The National Assurance Society paid to the plaintiff the 500*l.*, assured by the policy effected with their office; and 1,100*l.*, with an arrear of interest, remained due to the plaintiff from W. C. Ottley: but the directors of the Protector Life Association, though proof of the death of W. C. Ottley was sent to their office, with the indenture aforesaid, of the 29th of April 1842, refused to pay the 499*l.* secured by their policy, and alleged that the plaintiff, as such mortgagee, could not give a discharge for the money due upon the policy.

Mr. Jellicoe, the secretary of the Protector Life Association, sent a copy of a letter to the plaintiff, which had been written to H. Ottley, in answer to one from him, stating that Mr. W. C. Ottley was, at the time of his death, indebted to the association in the sum of 179*l.* 16*s.* 6*d.* or thereabouts, and that with regard to the sum assured by the Protector policy on his life, he was authorized to say that the directors would be ready to pay the money assured on the policy, on obtaining a proper discharge from him and Warner Ottley, the mortgagee, and to deliver over all effects in their custody, upon their, at the same time, having the above-mentioned sum of 179*l.* 16*s.* 6*d.* paid or allowed to them, and on surrender of the books and papers belonging to the Association retained by the deceased.

In answer to a further application, the secretary, on the 24th of August 1843, wrote that "the directors could not pay a mortgagee such as Mr. Warner Ottley was,

the sum assured under a policy, without the concurrent discharge of the executor or administrator of the assured." Inquiry was then made, whether they would pay if Mr. H. Ottley would prove the will and join in the receipt; but the reply was, that no answer could be given to a hypothetical case, and that the matter must remain as it was, until a probate from the proper Court in a sufficient amount was produced.

The directors, by their answer, said that they had offered to pay the money upon an indemnity, to be made at the expense of the plaintiff, and that they had offered a reference to another office, but that both offers had been refused; but they did not make any claim for a set-off, and insisted that the personal representative of W. C. Ottley was a necessary party to the suit.

H. Ottley, who had alone proved the will of the said W. C. Ottley, was made a party to the suit; but by his answer he disclaimed any interest in the policy.

Mr. Kindersley and *Mr. Heathfield* appeared for the plaintiff.

Mr. Turner and *Mr. Stevens*, for the trustees of the Protector Life Association. —The policy of assurance was a chose in action, of which the plaintiff was the mortgagee. The power of attorney to receive, and the authority to give receipts were insufficient to secure the defendants from future claims. If any action was brought it must be in the name of the executor: the defendants were not bound to pay without the receipt of the executor. If they did, the assurance company would still be liable to an action and also to suits, at the instance of the executor, for the amount of the policy.

Mr. Kindersley, in reply.

After the hearing, and before the judgment was given, the plaintiff died, and the suit abated; and upon its being communicated to the Master of the Rolls, he considered that he ought to postpone the judgment until the suit was revived.

Aug. 3.—The MASTER OF THE ROLLS.—The directors of the Protector Life Association refused to pay the sum assured by their policy. This suit was consequently instituted; and as there is no doubt either of the plaintiff's title to receive, or of the liability of the assurance office to pay, what is due on the policy, this contest carried on for victory and for cos being as I conceive no more si object of either party than, if pc charge the other with costs.

The judgment has been dela very long time, in consequenc abatement of the suit by the] death. I could not but hope th conducted as this is by gentlemen s able, and who so well know what be done in such a case, would h settled without further litigation such is not the case, I have again considered the correspondence. T on both sides sufficient errors to improper, in my opinion, to give the costs of the suit against the ot an apportionment it might, perhap sible to ascertain how much mi to be paid and received by the par an estimate of the costs occasione respective mistakes; but I think better to decree payment of what the debt to the plaintiff, without either side.

Let the defendants, the directo the plaintiff the sum of 499*l.* assu interest thereon at 4*l.* per cent. filing of the bill; but I shall giv on either side.

M.R.
July 14, 27. } BATEMAN *v.* HOT

*Legacy — Abatement — Debts — Years—Trust for Accumulation— ness—*39 *&* 40 *Geo.* 3. *c.* 98.

A testator directed payment of hi the first place, out of his personal clusive of leaseholds, and if not su charged his real estates with the he then gave divers specific artic son:—Held, that the specific lega liable for payment of the testat before the real estates.

A testator devised real estates t for 2,000 *years, and, subject t settled the estates upon his son with divers remainders over in declared that the trusts of the t to raise by sale or mortgage money to make up the deficiency of his estate to pay debts other than deb*

ıd legacies, and to apply the rents of the interest on mortgages and ies given by his will, and also to 500l. a-year for the discharge of rances on his estate. This sum the re yearly to invest, and accumulate d, when sufficient, the trustees were to apply the same in payment of ge, without waiting until the time lation had expired. The surplus to be paid to the parties entitled e, under the limitations; when the satisfied the term of 2,000 years se. The leasehold estates were to the trustees of the term upon est corresponding with those de- the real estate:—Held, that the ie term were valid, and that the ons directed were within the ex- he 39 & 40 Geo. 3. c. 98. s. 2, and rusts did not exceed the period law.

Hotchkin, by his will, dated the Iarch 1843, after ratifying his settlement, which was dated the ecember 1800, and appointing a 00l. to Marian Matilda Humfrey, r and younger child, under a power ıtained, said, "I direct that all bts, funeral and testamentary ex- ll, in the first place, be fully paid ırged out of my personal estate of leasehold tenements) if the be sufficient for that purpose; , then I charge my real estate deficiency, and direct the same d under the term of 2,000 years created for that purpose. I give ath unto my son Thomas Henry Iotchkin all the furniture, plate, a, pictures, engravings and books, horses, harness, farming stock, ıg and garden utensils, which, at my decease, shall be in or about ıg-house at Tixover and Wood- tively, and the offices, buildings, therewith respectively held, and er dwelling-house which, at the y decease, shall be my usual or residence." The testator then l annuities of 20l. and 15l. to two nd directed these sums to be paid rents and profits of his estates itaments at Great Humby and Little Humby and Ropsley, in the county of Lincoln; and he gave unto Humfrey Orme and William Jesse Street the sum of 4,000l. clear of legacy duty and all other deductions, to be raised as soon as conveniently might be after his decease out of all or some part of his said real estates under the trusts of the said term of 2,000 years, and to carry interest in the mean time until it should be raised at the rate of 4l. per cent. per annum, such sum of 4,000l. to be held upon the trusts declared in the said will. And the said testator also gave to the said Humfrey Orme and William Jesse Street the sum of 500l. sterling, clear of legacy duty and all other deductions, the same to be raised as soon as conveniently might be after the testator's decease, out of his real estate under the said term of 2,000 years, such sum of 500l. to be held on the trusts declared in the said will. The testator then gave and devised the manor of Great Humby, in the county of Lincoln, with the hereditaments, situate within the said manor, subject and charged as thereinbefore mentioned, and also all his hereditaments at South Luffenham, in the county of Rutland, and all his mansion and estates at Huttoft, Anderby, Thimbleley, Woodhall, Edlington, and Langton, in the county of Lincoln, and all other his real estate, whatsoever and wheresoever—in which devise he intended particularly to include those manors and hereditaments of which he was tenant for life under his marriage settlement, with remainder to his said son in tail, to the intent that his son and his issue, and all other persons capable of claiming both under the settlement and under his will might be put to his and their election, subject, as to such parts of his real estate as were comprised in his marriage settlement, to such of the uses and limitations of the settlement as might subsist and not be inconsistent with the above declaration, and especially to the term of years thereby created for raising the aforesaid portion for his daughter, to the use of the Rev. Gregory Bateman and William Jesse Street, for the term of 2,000 years, upon trust, by mortgage, sale, or other disposition of the said hereditaments, or any competent part thereof, to raise such sum of money as should be sufficient to make up the deficiency (if any) of his personal estate (except leasehold tenements), for the

payment of his debts, other than debts on mortgage; and also by the like ways and means to raise the said sums of 4,000*l.* and 500*l.*, thereinbefore bequeathed, in trust as aforesaid, and the legacy duty payable in respect thereof; and also the further sum of 4,000*l.*, with interest at the rate of 4*l.* per cent. per annum, from the day of his decease until the same should be paid, for his daughter Marian Matilda Humfrey, in addition to the portion of 6,000*l.* thereinbefore appointed to her; and upon further trust, that his trustees should out of the rents and profits of the hereditaments in Great and Little Humby and Ropsley, or any part thereof, raise and pay the said annuities of 20*l.* and 15*l.* respectively, or such of them as should be payable; and upon further trust, that his trustees should, out of the rents and profits of his said devised estates and hereditaments, after answering the purposes thereinbefore provided for, keep down all interest upon any money secured upon any mortgage of his said estates or any of them, and, subject as aforesaid, should, yearly until a sufficient fund should be raised to pay off and discharge all the principal money which should at his decease be due and secured upon mortgage of his said estates, or any part thereof, and which should be raised on mortgage under any of the trusts, or for any of the purposes of that his will, out of the residue of such rents and profits of his said devised estates as aforesaid, raise and set apart the clear yearly sum of 500*l.* sterling, as a sinking fund, for the discharge of such mortgages, and should, in the month of July in every year, lay out the said yearly sum or sinking fund of 500*l.* in the purchase of stock in permanent parliamentary stocks or funds, or at interest upon government or real securities, and accumulate the income in the way of compound interest; and as to all the trust monies, stocks, funds and securities, to be raised by such investments and accumulations, he directed that the trustees of the said term of 2,000 years, should stand possessed thereof, upon trust to call in and convert the said fund into money, and, with the proceeds thereof to pay off and discharge the said principal sum and sums of money, secured at his decease, or to be afterwards raised upon mortgage of his said estates, or any part thereof, together with all arrears of interest thereon. And the will contained a power for the trustees to pay off and discharge any one or more of the mortgages when a sufficient fund should have been raised, without waiting till the termination of the period of accumulations, and authority for the trustees to discharge such mortgages, in such course and order of priority as they or he should think fit. The will also contained a proviso that any mortgage made for raising the portion of 6,000*l.* thereinbefore appointed to the testator's daughter, should be considered to be a mortgage within the meaning of the trust for accumulation, the same as if the said portion had been raised by a mortgage made in the testator's lifetime and subsisting at his decease; and also a declaration that so much of the rents and profits of the said estates as should not be wanted for answering the purposes of his will should from time to time be paid to or received by the person or persons for the time being entitled to the estates comprised in the said term of 2,000 years, in remainder immediately expectant on the said term.

The will also provided for the cesser of the term as soon as all the trusts should be fully performed. And as to the testator's manors, estates, and hereditaments thereinbefore devised, after the expiration or determination of the said term of 2,000 years, they were devised to the use of his son, T. H. S. Hotchkin, and his assigns during his life, with remainder to the use of his grandson, T. J. S. Hotchkin, then an infant of the age of four years, for his life, with remainder to the use of the first, second, and third sons of the testator's said grandson, T. J. S. Hotchkin, successively, in tail male, with divers remainders over. And it was provided, that the said testator's son and grandson should confirm the disposition thereby made of the estates included in the said testator's marriage settlement, or forfeit all interest under the will.

The testator also bequeathed all the hereditaments, of or to which he was then, or at the time of his death should be possessed of or entitled to for any term or terms of years, unto the trustees of the said term of 2,000 years, upon and for such trusts, intents and purposes as would best or nearest correspond with

the uses and limitations thereinbefore declared and contained concerning the said real estates. The will also contained a power of leasing, and powers for the testator's son, and after his decease, for his grandson, when entitled to the actual receipt of the rents and profits of the estates, to make jointures and raise portions for younger children, and to create terms for securing the payment as provided by the will. The testator gave his residuary personal estate to his son, T. H. S. Hotchkin, and he appointed Gregory Bateman and William Jesse Street his executors. The testator died on the 24th of June 1843. His estates were subject to several mortgages and other incumbrances, which, with those created by the will, it would require a great number of years to discharge by means of the fund of 500*l.* a-year provided by the will for that purpose, and the personal estate was insufficient to pay the testator's debts, exclusive of the mortgages.

The bill was filed by the trustees, to obtain the opinion of the Court whether the personal estate of the testator, specifically bequeathed to his son T. H. S. Hotchkin, was, under the charge upon the real estates, exonerated from the payment of so much of the testator's debts, including mortgages, as his general residuary personal estate was insufficient to pay; and whether the trusts of the term of 2,000 years, under which the 500*l.* a year was to be accumulated, was valid; or whether they did not exceed the limit allowed by law for accumulation.

Mr. Kindersley and *Mr. Prior*, for the plaintiffs.

Mr. Turner and *Mr. Rogers*, for T. H. S. Hotchkin.—The mortgages amounted to about 82,000*l.*: to accumulate this would take upwards of 100 years. It was discretionary with the trustees whether they would exercise the power of sale, and apply the purchase-money in discharge of the mortgages. The direction to accumulate, therefore, was void, and the trusts of the term could not be carried into execution except for the payment of debts—*Lord Southampton* v. *Marquis of Hertford* (1), *Marshall* v. *Holloway* (2), *Lord Dungannon* v. *Smith* (3), *Vawdry* v. *Geddes* (4). A trust to pay debts out of real estate was good: it was a charge upon the estates; but the present was a scheme to prevent the estates from being sold; and the 39 & 40 Geo. 3. c. 98. gave no power to create such a term. The trusts also preceded the estate tail, and the tenant in tail had no power to put an end to the term or determine the trusts: the purposes of the will, therefore, were contrary to law, and could not be supported. The testator might have created a rent-charge, and have left the estate so that it could be dealt with, but he could not charge the estate with a given sum for an unlimited time. The trust, therefore, was void, and the term must sink into the estate after the debts were satisfied: if it did not, it might suspend the enjoyment of the estate. The testator's son was a specific legatee, and the will directed that the debts should be paid out of the personal estate, exclusive of the leaseholds, but it charged the real estates, and directed that payment should be made under the term of 2,000 years—*Cornewall* v. *Cornewall* (5), *Tombs* v. *Roch* (6), *Gervis* v. *Gervis* (7), *Spong* v. *Spong* (8), *Young* v. *Hassard* (9). The property specifically bequeathed could not be applied in payment of debts until the whole of the real estate was exhausted. In this case, therefore, the real estate was charged, and the personal property specifically bequeathed passed to the testator's son. Real estates specifically devised, and personal property specifically bequeathed, were equally applicable to pay debts; but when the real estate was charged with debts, the personal estate specifically bequeathed was exonerated.

Mr. Teed, *Mr. Hodgson*, and *Mr. Campbell*, for the children of the tenant for life.—This was a trust to liquidate debts: it was not subject to the laws against perpetuity; the question was, whether the estate was tied up so that it would not be saleable. Upon the case of *Lord Southampton* v. *the*

(1) 2 Ves. & Bea. 54.
(2) 2 Swanst. 432.
(3) 12 Cl. & Fin. 547.
(4) 1 Russ. & Myl. 203; s. c. 8 Law J. Rep. Chanc. 63.
(5) 12 Sim. 298.
(6) 2 Coll. 490; s. c. 15 Law J. Rep. (N.S.) Chanc. 308.
(7) 14 Sim. 654; s. c. *ante*, p. 422.
(8) 3 Bligh, N.S. 84.
(9) 1 Dru. & War. 638.

Marquis of Hertford, it was contended that the trust was void, except so far as it was for the payment of debts; but as the enjoyment and not the property is restricted, a gift like this would be supported—*Bacon* v. *Procter* (10). In the present case the trust could be put an end to by a sale. The tenant in tail also could make himself the absolute owner of the estate when he came of age; and as the leasehold estates were settled upon the same trusts as the freehold, the legacies must fall upon the real estates.

Mr. Nevinson, for R. B. Humfrey and Marian Matilda, his wife, claimed to have the 6,000*l.* and the 4,000*l.* raised under the term of 2,000 years.

Mr. Terrell and *Mr. R. W. Moore* appeared for some of the legatees and annuitants.

Mr. Turner, in reply, cited *Lombe* v. *Stoughton* (11).

The Master of the Rolls.—It is contended, first, that the trust for raising and accumulating a fund for payment of the mortgages is void for remoteness, and that it tends to a perpetuity; and, secondly, that the specific legacies ought to be exonerated from the payment of the testator's debts. As to the term and the trust for accumulation, it may be observed, first, that the debts, for the payment of which the accumulation is directed, are mortgages, either existing at the testator's death or made pursuant to his will, and that they are charges on the estate of an amount ascertained, or to be ascertained in the execution of valid trusts; secondly, that the total amount compared with the rents of the property comprised in the term is so great that the accumulation of rent, managed as directed by the testator, would not be sufficient to pay the mortgages till after the lapse of many years, too long if considered as an absolute term for accumulation; thirdly, that the mode in which the testator has limited the estate, subject to the term, is not liable to any objection, as the first tenant in tail, on attaining twenty-one years of age, may, subject to the mortgages, acquire an absolute dominion over it; and, fourthly, that when that event happens, the trustees of the term will become trustees for the owner of the estate, who may then deal with the term, and with the estate at his own discretion, subject only to the mortgages. Without the consent of the owner of the estate, the trust for accumulation cannot continue beyond the time which the law allows for the suspension of full power over the estate. That period is regulated by law, and accumulation, except at the will of the owner, can continue only during that lawful suspension; and considering this case to be within the exceptions of the statute, I cannot hold the term and the trust for accumulation to be void for remoteness. I think this an indiscreet mode of raising money for the payment of debts; but the trustees may, perhaps, mitigate the inconvenience, by exercising their discretionary power to apply any portion of the accumulated fund in satisfaction of mortgages before such fund is sufficient to pay all, or it may be mitigated by the exercise of the power which the mortgagees have to enforce payment of their mortgages or foreclose the estate, without regard to the trust for accumulation.

Upon the second point, I consider it settled that if there are specific devises and specific legacies, and a deficiency of general assets to pay debts, the specific gifts, whether real or personal, must be made to contribute rateably to the deficiency, and as between different objects of his bounty, or different purposes intended to be answered, the testator may exonerate his personal estate from the charge of his debts. But the present case depends on the peculiar expressions used in the will, and the construction which ought to be put upon them. The testator directs that all his debts and expenses shall in the first place be fully paid out of his personal estate, exclusive of leasehold tenements, if the same shall be sufficient, and if not, then he charges his real estate with such deficiency, and directs the same to be raised under the term of 2,000 years. He then gives the specific legacies to his son, and, afterwards, in declaring the trusts of the 2,000 years' term, he directs his trustees to raise such a sum of money as shall be sufficient to make up the deficiency (if any) of his personal estate (except leasehold tenements) for payment of his debts other than debts on mortgage. It is so explicitly directed that the

(10) Turn. & Russ. 31.
(11) 12 Sim. 304.

debts are to be paid out of personal estate (exclusive of leaseholds) and that the deficiency, if any, is to be paid by means of the term, that it does not appear to me practicable to put upon the words expressing the direction the construction that the testator intended, with the leasehold tenements, to exclude the personal estate specifically bequeathed; and though I am afraid that the real intention of the testator may be defeated, I think that he has, by the words used, not only directed payment out of his personal estate, but excluded the general rule as to contribution to be made by specific devisees and specific legatees.

The decree declared the trusts of the term of 2,000 years, so far as they related to the raising the yearly sum of 500*l.*, for the payment of the mortgage debts, to be valid in law; and that the testator's personal estate specifically bequeathed other than his leasehold estates was to be applied in payment of the testator's debts on mortgage or otherwise, in priority to the testator's real and leasehold estates.

Note.—See Hargrave on the Thellusson Act, Chap. V. Sec. I.

M.R.
April 27, 28, 29; August 3.

LEE *v.* LOCKHART.
WILD *v.* LOCKHART.

Mortgage—Estates sold by Consent—Securities deficient—Costs—Mode of Payment.

The mortgage of a mesne incumbrancer extended over the whole of certain estates, parts of which had been previously mortgaged to other persons, and parts of which were also subsequently mortgaged. The mesne incumbrancer filed his bill for an account, and for redemption of the prior and foreclosure of the subsequent mortgages, and a decree was made by consent of all parties interested that the whole of the estates should be sold; that the proceeds of the sale should be paid into court, and apportioned according to the value of the parts of the estates comprised in the several mortgages; and that the priorities of the incumbrances should be ascertained on further directions. No question was raised as to the incumbrances or their priorities, but only as to the costs:—Held, that each of the prior mortgagees was to be paid his principal, interest, and costs out of the sum in court apportioned in respect of his mortgage, and not out of the general fund.

John Fenton Cawthorne being entitled to certain estates, partly in settlement and partly not, on the 29th of May 1797, charged the settled portion with the sum of 1,500*l.*, advanced to him by Richard Gibbeson and Thomas Greaves, and by indentures of lease and release of the 20th and 21st of June 1797, conveyed the same to trustees in trust to pay the sums respectively due to certain of his creditors, parties thereto. He subsequently sold the unsettled portion of the estates, and the settled portion was thereafter called the "settled estates," by way of distinguishing them from after-purchased estates called the "unsettled estates." The charge of 1,500*l.* was in 1813 assigned to John Dowbiggin, and ultimately became vested, by way of security, in Mary Wild, the plaintiff in the second suit. In February 1813, Mr. Cawthorne mortgaged part of the settled estates to John Yeats, to secure the sum of 5,000*l.*, and he also mortgaged other parts thereof to Edward Yeats, the son and legal personal representative of John Yeats, and also to other persons respectively at various times to secure sums advanced by them. The several parts so mortgaged were released by Mr. Dowbiggin from the charge of the 1,500*l.*, which, on its creation, extended over the whole of the settled estates. By indentures of lease and release of the 7th and 8th of December 1821, the whole of the settled estates, together with the said charge of 1,500*l.* were conveyed by Mr. Cawthorne, and Mr. Dowbiggin as his surety, to Mary Wild, the plaintiff in the second suit, to secure the sum of 17,000*l.* advanced by her to Mr. Cawthorne; Mr. Dowbiggin's claim being thereby postponed. There were also subsequent mortgages of the same estates to other parties. The unsettled estates were also mortgaged in separate parts to several persons, and by indentures of the 7th and 8th of December 1821, the whole of them were conveyed to Mary Wild in mortgage. On the 18th of April 1831, the suit of *Lee* v. *Lockhart* was instituted by the plaintiff

on behalf of himself and all other the unsatisfied creditors of J. F. Cawthorne, the payment of whose debts was secured by the trust deed of June 1797, for an account and a sale of the property unsold; and on the 21st of the same month of April, Mary Wild filed her bill in the suit of *Wild* v. *Lockhart*, praying that an account might be taken of what was due to the prior mortgagees and the creditors under the deed of 1797; that the priorities of the several incumbrancers might be ascertained; that on payment of what was due to them, she might be at liberty to redeem; and that the subsequent mortgagees might pay what was due to the prior incumbrancers or be foreclosed. On the 18th of February 1834, a decree was made in both suits, directing inquiries, and accounts of all charges, mortgages, and incumbrances and what were their priorities; and it was thereby ordered, by consent of all parties interested therein, that all the estates in the pleadings mentioned should be sold, that the money arising from the sale should be paid into court, and that all proper parties should join in the conveyances of the estates; and it was further ordered, that the Master should ascertain the value of, and distinguish the amount arising from the sale of the respective estates, having regard to the respective incumbrances thereon; and all such sales were to be without prejudice to any questions which might arise respecting the debts, charges, mortgages, and incumbrances, or their respective priorities, or the apportionment of such purchase-monies; and it was further ordered, that the Master should tax all parties their costs of the first-mentioned cause, reserving the consideration out of which fund they were to be paid, and that the decree should be prosecuted by the plaintiff in the second cause. Before the Master's report was made Mary Wild died, and William Wild, her legal personal representative, revived the suits; and Edward Yeats having also died, his interest vested in his executors, the survivor of whom having died, John Yeats Thexton became his legal personal representative, and was now a defendant. By an order of the 24th of July 1843, it was ordered, that the mortgagees of the several parts of the unsettled estates might be allowed to become the purchasers of the parts comprised in their respective mortgages at certain nominal sums over and above the amount of the principal and interest due thereon, for the purpose of avoiding the expense of a sale by auction under the decree.

The estates having been all sold under the decree, the Master made his report, bearing date the 24th of July 1846, and thereby certified what were the incumbrances affecting the settled estates, their priorities, and what was due thereon respectively. He found that the said sum of 1,500*l.*, together with interest thereon, was still due and owing to the plaintiff, William Wild, as executor of Mary Wild, and that it at first covered all the estates, but that various parts of those estates were discharged therefrom afterwards; that the debts secured by the deed of the 21st of June 1797 were (subject to the said 1,500*l.* and interest) the first incumbrance on the settled estates; that the various mortgages vested in J. Y. Thexton as the representative of Edward Yeats and of the several other persons therein mentioned, were the second incumbrances on the respective parts of the settled estates; and that the mortgage of the 8th of December 1821, to Mary Wild, was the third incumbrance, and so of the subsequent charges. The plaintiff, therefore, was declared to be the third incumbrancer on part and the second incumbrancer on the remainder of the settled estates, of which the legal estate was now outstanding in the trustees of the settlement of those estates. The Master also apportioned the proceeds of the sale of the settled estates, and certified what were the different sums so apportioned in respect of the parts comprised in the several mortgages.

The causes having now come on for further directions, there was no question raised as to the incumbrances themselves or their priorities, the only question being as to the costs. The minutes of the order, as proposed by the plaintiff, were, that J. Y. Thexton and the other mortgagees prior to the plaintiff, W. Wild, should be paid their principal, interest and costs out of the sums so apportioned in respect of the estates comprised in their respective mortgages, and then that he should be paid his charge out of the residue thereof, together with the sums apportioned in respect of the parts not comprised in their mortgages. The defendants,

the prior mortgagees, on the other hand, insisted that they were entitled to have their principal, interest and costs paid to them in full by the plaintiff or out of the general proceeds of the estates, and that the plaintiff ought to be ordered to marshal the debts due under the trust deed of 1797, as well as the costs of the suits and all other charges, and throw them on the residue of the settled property in mortgage to the plaintiff.

Mr. Turner and *Mr. Hare*, for the plaintiff.

Mr. Kindersley and *Mr. Gardner*, for the defendants, J. Y. Thexton and the other mortgagees in the same interest.

Mr. Sidebottom, Mr. Shapter, Mr. Rasch, Mr. E. Morris, Mr. Geldart, Mr. Osborne, Mr. Elmsley and *Mr. T. V. Dawson*, for other parties.

The MASTER OF THE ROLLS said—There was no authority applicable to the question at issue, but there was authority for the position that a decree for sale of incumbered estates did not alter the rights of the parties; and several cases might be cited in support of it. Now, if there had been no sale, each mortgagee would, on being redeemed, have got his principal, interest and costs; and, considering the purchase-money as a substitution for the estates, it was said it ought to be applied generally in discharge of the prior incumbrances and of costs. But if there had been no sale the incumbrancers might have foreclosed, and would then have taken only the estates themselves. The sale, however, was consented to by the mortgagees, and though it was for the benefit of the subsequent incumbrancer, he thought that the money arising from the sale of each of the separate incumbered estates must be applied in payment of the principal, interest and costs of the respective mortgagees; and that the costs were not to be paid out of the general fund. It would have been better if there had been an arrangement when the decree was made, that the money arising from the separate portions of the estates should stand in the place of the estates themselves, and be treated as the estates.

V.C. Jan. 25, 26. } THE ATTORNEY GENERAL *v.* TREVELYAN.

Information—Charity—Lapse of Time.

An information was filed by the Attorney General in 1710 *to recover certain lands, formerly chantry lands, which had been granted by King Edward VI. for the benefit of the Morpeth School, against the defendants, who represented the Thornton family, to whom a lease of the lands for* 500 *years had been granted in* 1685. *A commission was issued to ascertain the identity of the lands. The commissioners reported that they were unable to ascertain which were the chantry lands. No final decree was made in consequence of a compromise having been entered into between the parties, by which it was agreed that* 100*l. per annum should be paid to the charity, and that an act of parliament should be obtained to carry the compromise into effect, but that if the act should not be obtained within two years, then that the agreement should not be binding. No such act was ever passed, but the owners of the property continued to pay the* 100*l. per annum up to the present time, being a period of* 130 *years. Another information was filed in* 1833, *to have the benefit of the proceedings commenced in* 1710, *and prayed that the lease for* 500 *years might be set aside, and that the chantry lands might be ascertained:—Held, that the stipulation as to obtaining an act of parliament not having been performed, the parties were in the same situation as at first, and the relators were entitled to the benefit of the proceedings under the original information; and that an inquiry ought to take place to ascertain what portion of the lands would be of equal value to those granted by King Edward VI.*

This was an information and bill, filed by the Attorney General, at the relation of the master of the grammar school at Morpeth, in Northumberland, to recover certain lands at Netherwitten, in the said county, formerly chantry lands, which were the subject of a grant to the bailiff and burgesses of Morpeth, for the benefit of the school, by King Edward VI., in the year 1553. These lands were demised on the 28th of May 1685 to Nicholas Thornton for 500 years at 45*l.* per annum. On the 26th of April 1710, the Attorney General, at the relation of the

master and usher of the school, filed an information against the heir and personal representative of the said N. Thornton, to have the last-mentioned lease set aside, and the chantry lands set out. In December 1710, John Thornton, the heir and executor, filed a cross bill against the bailiff and burgesses of Morpeth and the masters of the school, to have the lease confirmed. A great quantity of evidence was adduced to shew the extent and value of the lands, and both suits came on to be heard on the 22nd of July 1712, before Lord Harcourt, who decreed that a commission should issue to ascertain the chantry lands demised by the said lease, and if the commissioners were unable to distinguish the said lands from the lands of the said defendant, then to inquire the yearly value of the chantry lands, and of the whole township of Netherwitten, and what proportion of the whole township the school lands were, and that the cross bill might be dismissed with costs. A commission was accordingly issued, under which evidence was adduced on behalf of the relators and defendants, and the commissioners returned that they were unable to distinguish the chantry lands, that they had therefore proceeded to inquire as to their proportion, and referred to the depositions of the witnesses. No final decree was, however, made, in consequence of a compromise having been effected between the parties by articles of agreement, dated the 4th of November 1714, and made between the bailiff and burgesses of Morpeth and John Thornton, Esq. By this document the suit then pending was recited, and also the lease for 500 years. It was then covenanted, concluded and fully agreed upon, by and between all the parties thereto, in the manner and form following, that is to say, "the bailiffs and burgesses do hereby, for themselves and their successors, covenant and agree to and with the said John Thornton, his heirs and assigns, and to and with every of them, that they, the said bailiffs and burgesses and their successors, by and with the consent of the said master and usher, to be testified by their being parties thereto, shall and will, at and upon the reasonable request and at the proper costs and charges in the law of the said J. Thornton, his heirs and assigns, make, do and execute unto the said J. Thornton, or to such other person or persons as he shall for that purpose appoint, such lawful and reasonable act and acts, conveyance and conveyances, assurance and assurances whatever of the said school lands in Netherwitten, as by the said J. Thornton, his heirs and assigns, or by his or their counsel shall be reasonably devised or advised." "And further, that the bailiffs and burgesses, and their successors, and the master and usher of the school for the time being, shall, at the costs and charges of the said John Thornton, consent to and give all fitting encouragement, at the charge of the said J. Thornton, for obtaining and procuring an act of parliament for vesting the freehold and inheritance of the school lands in Netherwitten in the said J. Thornton, his heirs and assigns, or in such other person or persons, and his and their heirs, as the said J. Thornton, his heirs and assigns, shall appoint, discharged from all rents and other sums of money payable to the master and usher of the school for the time being, or to the bailiffs and burgesses, or their successors, in trust for them, in and by which act of parliament it shall be provided that all the estate of the said J. Thornton in Netherwitten shall stand chargeable as well with the payment of the sum of 2,000*l.*, and the interest thereof, as also the yearly payment of 100*l.*, in such manner as hereinafter is mentioned." "In consideration thereof, the said J. Thornton does covenant, promise, and agree with the bailiffs and burgesses, and their successors, in the manner following, that is to say, that he, the said J. Thornton, his heirs, executors, and administrators, or some of them, shall and will well and truly pay, or cause to be paid, to the bailiffs and burgesses, or their successors, the sum of 2,000*l.* of lawful money of Great Britain, for the purchase of the absolute fee simple and inheritance of the said school lands and premises in Netherwitten, when and so soon as a convenient purchase of other lands, tenements, and hereditaments to that value, and to the good liking of the said bailiffs and burgesses, or their successors, can be had, obtained, or gotten to be settled for the benefit of the school, to such and the same uses as in the letters patent are specified and mentioned, so as such purchase be made by the bailiffs and burgesses within the space of seven years next after the date of

these presents; and it is hereby further agreed by and between all the parties to these presents, for them, their heirs and successors, that if the bailiffs and burgesses, or their successors, do not, within the said space and time of seven years next ensuing, make such purchase as aforesaid, that then and from thenceforth it shall and may be lawful to and for the said J. Thornton, his heirs and assigns, to purchase lands or tenements in the county of Northumberland, with the sum of 2,000*l.* to be settled for the benefit of the school, and to the same uses in the letters patent mentioned, so as such lands so to be purchased by the said J. Thornton, his heirs or assigns, be not of less yearly value than 100*l.* per annum. Item, it is hereby further covenanted and agreed between all the parties to these presents, and the said J. Thornton does covenant and agree with the bailiffs and burgesses, and their successors, that he, the said J. Thornton, his heirs and assigns, shall be at the charges and expense of all the conveyances, and all other assurances proper to be made and done for the purchasing and conveying of such lands for the use and benefit of the said school as aforesaid; and that until the time a purchase can be made, he, J. Thornton, his heirs and assigns, shall and will, yearly and every year, well and truly pay unto the bailiffs and burgesses, or their successors, for the purposes in the letters patent, the sum of 55*l.* over and above the sum of 45*l.* reserved and made payable by the lease of the 20th of May 1685, and so, according to the rate of 100*l.* per annum for any lesser time that may happen between the last half-yearly payment and the time of such purchase. And it is further agreed by and between the parties to these presents, and the said J. Thornton covenants and agrees with the bailiffs and burgesses, and their successors, that if it shall happen that they, the bailiffs and burgesses, shall at any time within the space of seven years, purchase any lands for the purposes aforesaid, of the value of 2,000*l.*, or of any smaller or lesser value, that then in any of those cases he, the said J. Thornton, will, upon the request of them or any of them, well and truly pay, within the space of six months next after such request, to the bailiffs and burgesses the sum of 2,000*l.* or such smaller sum of money as they shall from time to time have occasion to pay for the purposes aforesaid, so as such sum or sums exceed not in the whole 2,000*l.*, and so as the yearly payment of 55*l.* and 45*l.* be lessened in proportion to the sums of money to be by the said J. Thornton paid as aforesaid in part of the 2,000*l.* in proportion and after the rate of 5*l.* per cent. per annum for every 100*l.* to be paid. Item, the said J. Thornton does hereby, for himself and his heirs, covenant and promise to the bailiffs and burgesses, that the said J. Thornton, his heirs and assigns, shall, at their own expense, use all lawful ways and means for procuring, obtaining, and getting an act of parliament for the purpose aforesaid, within the space of two years next ensuing the date hereof. Item, it is hereby further covenanted, declared, and fully agreed upon, by and between all the parties to these presents, that in case such act of parliament cannot be got and procured within the time aforesaid, then these presents or anything therein shall not be by any of the parties to these presents, made use of as evidence or otherwise to the prejudice of any of the parties concerned in the said suit now depending in the said Court of Chancery, in any manner howsoever, anything hereinbefore contained to the contrary notwithstanding."

Soon after the date of this agreement, the Rebellion broke out, and John Thornton, having espoused the cause of the Stuarts, was taken at Preston, and attainted of high treason; his life was spared, but his property was forfeited and sold. Nothing further was done under the agreement; and up to the present time the owners of Netherwitten, the lineal descendants of John Thornton, have regularly paid 100*l.* a year to the trustees of the school.

Another information and bill were subsequently filed on the 24th of December 1833, setting forth the various matters above stated, and alleging that the rents and profits of the lands therein specified, and which belonged to the said charity, were applicable only to the maintenance of the said school of King Edward the Sixth, at Morpeth, and of the masters and ushers thereof, and that the said lands had been confounded and intermixed as to their boundaries with other lands; and that the persons under whom the defendants claimed had,

many years since, procured a lease of the said chantry lands to be granted to them for a term of 500 years, which lease was void; and the information further stated various proceedings which had taken place under the suit instituted in 1710, against the persons then in possession of the said chantry lands, and alleged that the compromise of the said suit, which had been effected, was illegal. The information prayed that the said lease for 500 years might be declared void, and that it might be decreed that the defendants, the owners of the land in the said township of Netherwitten, should either set out or distinguish the said chantry lands, or should make adequate compensation to the said charity by conveying to the bailiff and burgesses of Morpeth, to be held upon the trusts expressed by the original letters patent, so much land in the said township as should bear to the whole quantity of land in the said township the same proportion which the number of farms comprised in the said chantry lands bore to the total number of farms comprised in the said township; and that a commission might issue to set out such quantity of land in the said township in the possession of the said defendants as might be of equal value with the said chantry lands, and that the said defendants might be ordered to convey to the bailiff and burgesses and their successors the said lands when so set out, and to deliver up to them possession thereof, and that the defendants might account for the rents and profits of the lands so set out, and for the proceeds of any timber cut thereon, which had been received by them; or, if necessary, that another commission might issue to inquire and ascertain which and what quantity of lands in the possession of the said defendants in the township of Netherwitten were chantry lands granted by the said letters patent as demised by the said lease of 500 years; and if, by reason of the confusion of the boundaries or alterations of names, or any other circumstances, the commissioners should not be able to distinguish or ascertain the said chantry lands or any of them, in that case that the said commissioners might be ordered to set out such quantity of lands then in the possession of the said defendants within the said township as might be of equal value with the said chantry lands, or so much thereof as could not be distinguished or ascertained as aforesaid.

The case now came on for hearing, upon a supplemental information filed on the 1st of April 1845, praying that the plaintiffs might have the benefit of the proceedings in the original information and bill respectively.

Mr. Stuart and *Mr. Bates* appeared for the relators, and contended, that as no act of parliament had ever been obtained under the aforesaid articles of agreement, the covenants therein contained were not binding upon the relators. The form in which the present relief was prayed was this, that the owners of the land might set out and distinguish the chantry lands, or make adequate compensation to the charity by conveying to the bailiff and burgesses of Morpeth an equivalent amount of property. This species of relief was sanctioned not only by the decree of Lord Harcourt in this case, but also by the case of *The Attorney General* v. *Fullerton* (1), in which case Lord Eldon said:—"It has been long settled, and that law is not now to be unhinged, that a tenant contracts, among other obligations, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property not in any way confounded with his own." His Lordship then said, that the tenant was bound at the end of his lease to render up specifically the landlord's land; and if he could not, that a commission should issue from the court of equity to inquire what were the lands of the landlord; and if the tenant should have so confounded the boundaries of the land that it could not be ascertained, then the Court would ascertain the value of such lands. By the articles of agreement of 1714, time was made the essence of the contract; two periods were fixed; the act of parliament was to be obtained within two years, and a period of seven years was fixed for the purchase of land for the sum of 2,000*l.* If such purchase had been made at that time, the property would have been worth to the charity much more than 100*l.* per annum. The agreement had been transgressed in every way. No such purchase was ever made, and no act of parliament was ever obtained or attempted to be obtained. Under these circumstances, it was

(1) 2 Ves. & Bea. 263.

the duty of the Court to decree according to one or other of the alternatives in the prayer of this bill, and to restore to the charity the possessions to which they were rightfully entitled.

Mr. Bethell, *Mr. Prior* and *Mr. Otter*, appeared for the principal defendants, Raleigh Trevelyan, W. J. Charlton, Elizabeth Witham, and R. J. Trevelyan, the present representatives of the Thornton family, and contended that the agreement of 1714 ought to be held binding on the charity. The compromise of the suit, although effected 130 years ago, had been acquiesced in by all parties, and had been acted upon ever since, and it had not been suggested that such agreement was otherwise than beneficial to the charity, which had actually gone on receiving the 100*l.* a-year under that agreement since 1833, when this information was filed, making a period of thirteen years. This agreement was not entered into without deliberation, for it appeared that the suit was instituted in 1710. A decree was made in 1712, directing inquiries as to the identity of the land, and a commission was appointed for that purpose. The consideration of the question in the cause as to the validity of the lease was reserved until the report of the commissioners should have been made; the commissioners were unable to afford any information upon the subject, and could not ascertain the boundaries of the land: in this state of things, the best plan for the advantage of the charity, which could have been suggested, was carried into effect, namely, a compromise. The litigation was stopped, and the articles and agreement already stated were executed. It was true that there was no direct evidence of this compromise having been sanctioned by the Lord Chancellor, but it might be collected as a necessary inference that it had the entire approbation of the Attorney General and of the Court. It was evident from the amount of rent to be paid, that this arrangement was better for the charity than any judicial decision could have been, and it was very clear that the charity must have considered it in that light, since it had remained uninterruptedly performed for 130 years. The Court would be bound after so long a time to presume that the agreement was effected with the approbation of Lord Chancellor Harcourt, and with the sanction of the Attorney General. The next point was, that although it was the undoubted principle of this Court that a charity was incapable of alienation, yet that principle must be received with some degree of qualification. It must be shewn that the interference of the Court would be for the benefit of the charity, and it did not appear from the evidence produced that such would be the case. If the proposition for a settlement of the question by means of the articles of agreement had been stated to the Court, it was reasonably plain that the Lord Chancellor would have approved of it, and would have directed an application to parliament for a special act to carry it out; and if so, the Court would now be bound to enforce the contract and dismiss this information, which appeared on the face of it to be a supplemental information, and ought to rest upon the evidence which was existing at the time it was originally filed. At the time the compromise was effected 100*l.* was, at least, one equal fourth part of the then yearly rental of the lands, and as the chantry lands were supposed by the relators to be about a fourth of all the lands, this sum was fixed upon, and was an ample remuneration to the charity, and more than double what they had been receiving for a very long time.

The following cases were cited—

The Attorney General v. *Warren*, 2 Swanst. 291.
Chalmer v. *Bradley*, 1 Jac. & Walk. 63.
Gibson v. *Clark*, Ibid. 159.
The Attorney General v. *Hungerford*, 8 Bli. 437.

Mr. J. Parker and *Mr. Hubback* appeared for the corporation.

Mr. Stuart, in reply.

The Vice Chancellor.—I will state to you the view I take in this case. In the agreement which was made there is a provision, that unless the act of parliament should be obtained within two years the whole should be void. Then you see the necessary consequence of that was, inasmuch as the thing was not done which the parties had agreed to do, that there was an end of it; and then there has been since that time merely a voluntary payment, and a voluntary accept-

ance, of the sum of 100*l.* a-year, and no binding agreement on either side. And is not the necessary consequence of this, that the parties are now, after the lapse of 133 years, just in the same situation as they were when the commission was returned? The only question is about the terms in which the decree is to be made. It occurs to me that the decree should be made with a declaration, that under the circumstances of the case the plaintiffs are entitled to the benefit of the decree and the proceedings in the former suit, and indeed in the subsisting suit, as I take it for granted that the precise lands themselves never can be ascertained; and I think, therefore, it should be referred to the Master to ascertain what portion of the lands held by John Thornton in the year 1714 will be of equal value with the lands which were granted by King Edward the Sixth, because you must take out of the lands he then had—I am not speaking of the lands he subsequently acquired—such a mass of lands as will be equal in value to the lands that were granted by King Edward the Sixth.

V.C. Aug. 2. } FINDEN *v.* STEPHENS.

Costs—Interlocutory Applications—Demurrer.

The plaintiff, having filed his bill, gave notice of motion for an injunction, which stood over, at the request of the defendants, that they might file affidavits. Before the motion was heard, the defendants put in a demurrer, which was overruled; but, upon appeal, the demurrer was allowed, and the plaintiff was ordered to pay the costs of the demurrer and the costs of the suit:—Held, that the defendants were not entitled to their costs occasioned by the motion for an injunction.

This was a petition presented by the plaintiff, and it stated that the bill was filed on the 14th of August 1846, and the plaintiff served the defendants with notice of motion for an injunction on the 18th of the same month; that the motion came on for hearing upon the 21st, when it was ordered to stand over at the request of the defendants' counsel, until the 26th, to allow the defendants time to answer the plaintiff's affidavit; that on the 22nd of August the defendants filed a demurrer to the bill, which came on to be heard before the Vice Chancellor upon the 9th of November 1846; that the demurrer was overruled, and the defendants were ordered to pay the costs of such demurrer; that the defendants appealed to the Lord Chancellor from that order, and the cause was re-heard on the demurrer before his Lordship, on the 9th of December 1846, when it was ordered that the said order of the Vice Chancellor, dated the 9th of November, should be reversed, and that the demurrer should be allowed: (1) it was further ordered that it should be referred to the taxing Master to tax the defendants their costs, occasioned by the said demurrer, and also their costs of this suit, and that such costs should be paid by the plaintiff; that no order was ever made on merits, in pursuance of the notice of motion for an injunction, and that the taxing Master, by his certificate, allowed the defendants the costs of the said motion for the injunction. The petition prayed for liberty to file exceptions to the taxing Master's report, or that the said taxing Master should be directed to review his report.

Mr. Bethell and *Mr. Moxon*, in support of the petition, contended, that the taxing Master ought not to have allowed the costs of the motion for an injunction. The defendants had, by their own act, prevented the motion being made, and it could not, therefore, be viewed as an abandoned motion. It might fairly be presumed that if the motion had been made before the Vice Chancellor, it would have been successful, since the defendants' demurrer was overruled by his Honour. In that case the defendants would not, as parties opposing the motion, have been entitled to their costs of it, as costs in the cause, according to the rule laid down by Sir John Leach (2). If the defendants had wished the Court to dispose of the costs of the motion they ought to have had the matter mentioned before the passing of the order made by the Lord Chancellor; but no mention of these costs

(1) *Ante*, p. 63.
(2) 1 Sim. & Stu. 357.

was made at the time of the appeal. The following cases were cited:—

Farquharson v. *Pitcher*, 4 Russ. 510.
Lewis v. *Armstrong*, 3 Myl. & K. 69.

Mr. Stuart and *Mr. Bazalgette*, contrà, contended that the defendants were entitled to their costs of the motion under the 45th Order of May 1845 (3); by which it was directed, that where a demurrer was put in to the whole bill and allowed, the plaintiff must pay the costs of the demurrur and the costs of the suit also. This would necessarily include all the costs occasioned by interlocutory proceedings, and consequently the costs of the motion. The case of *Dugdale* v. *Johnson* (4) was cited.

The VICE CHANCELLOR.—This is a mere question of costs. The Lord Chancellor made an order, which directed that there should be a reference to the taxing Master, to tax the defendants their costs occasioned by the demurrer, and their costs of this suit; then the only question is, whether the costs occasioned by the interlocutory application on a collateral proceeding should be allowed. It appears to me that they should not. If this circumstance had been mentioned to the Lord Chancellor he might have gone on to say, "and also the costs of the motion;" but as he did not, I do not see that such costs can be allowed. Suppose the costs had been incurred in respect of the defendants' motion, that is, suppose the defendants had moved to take the bill off the file, on account of its not having been filed with the authority of the plaintiff, and that the plaintiff might be ordered to find security for costs, this motion might have been made, and yet the defendants might have thought proper to file a demurrer, would the costs of the motion go as costs in the cause? The only question is, whether these costs, strictly speaking, are costs in the suit. I think the costs, which were necessary for the purpose of bringing the suit to a hearing, and which would necessarily arise during the progress of the suit to its determination, are included; but those costs which were merely optional ought not to be allowed.

(3) Ord. Can. 301; 14 Law J. Rep. (N.S.) Chanc. 289.
(4) 5 Hare, 92.

END OF TRINITY TERM, 1847.

REPORTS

OF

Cases in Bankruptcy.

ARGUED AND DETERMINED IN THE COURT OF REVIEW.

BY

BENEDICT LAWRENCE CHAPMAN, Esq.
BARRISTER-AT-LAW.

FROM MICHAELMAS TERM, 1846, TO TRINITY TERM, 1847,
BOTH INCLUSIVE.

CASES IN BANKRUPTCY

ARGUED AND DETERMINED IN

The Court of Review.

COMMENCING WITH

HILARY TERM, 10 VICTORIÆ.

1847. Jan. 13. } *Ex parte* DERING *in re* CRAMP.

Trading — Cow-keeper — Annulling Fiat Delay.

A. had a farm of about 100 *acres, cultivated by him in such a manner that no live stock was required to be kept by him on it. A. had for some years four cows, which were kept by him solely for the purpose of making a profit by their milk and calves. All the milk produced was from time to time sold, and none of it was used for A.'s family:—Held, that A. was not a "cow-keeper" within the meaning of the* 5 *&* 6 *Vict. c.* 122. *s.* 10.

A fiat issued against A. on the 19*th of September. On the* 9*th of October there was a choice of assignees. The* 14*th of December was the day appointed for granting the bankrupt his certificate. On the* 12*th of December notice was given by the petitioner of an intention to present a petition to annul the fiat, on the ground that A. was not a trader; and on the* 14*th of December a petition was presented:—Held, that the petitioner was not precluded from being heard, on the ground of delay.*

On the 19th of September 1846 a fiat in bankruptcy issued against John Cramp, by the description of "cow-keeper," upon his own petition, and he was found and adjudged a bankrupt. On the 9th of October there was a choice of assignees. The 14th of December was the day appointed for granting the bankrupt his certificate. On the 12th of December the solicitors for the petitioners, who were creditors of the bankrupt, applied to the Commissioners to defer the granting of the certificate on the ground that they intended to present a petition to annul the fiat. On the 14th of December the petitioners presented a petition, praying that the fiat might be annulled, on the ground that John Cramp was not a cow-keeper. This petition now came on to be heard.

By the 6 Geo. 4. c. 16. s. 2. it is enacted, that no farmer shall be deemed a trader liable to become bankrupt. By the 5 & 6 Vict. c. 122. s. 10. it is enacted, that "cow-keepers" shall be deemed traders, and liable to the bankrupt acts.

The case stated by the bankrupt, in opposition to the petition, was as follows: —The bankrupt, for some years before the fiat, occupied a farm in the Isle of Thanet, consisting of 102 acres. The farm was formerly all arable, but three or four years before the fiat, two acres had been converted into pasture. Carraway seeds constituted the greater part of the produce of the farm. The farm was cultivated principally by

manual labour, and very little horse labour was used. No stock was required to be kept on the farm. About four years before the fiat the bankrupt purchased four Alderney cows, and, from time to time until the fiat, replaced them with others, so as always to keep up the number to four. He kept them solely for the purpose of making a profit by their milk and calves, and they were not required for the farm. All the milk produced was sent at once to Mr. Allen, a cow-keeper, who disposed of it by retail, and no part of it was used for the bankrupt's family or labourers. The accounts of the milk and calves were kept separate from the farming accounts. The receipts from Allen averaged about 30*s.* a week. The bankrupt converted the two acres above mentioned into pasture solely for the cows. The cows for the most part were fed on grain, bran, and artificial food, purchased by Cramp for them.

Mr. Swanston and *Mr. Collins*, for the petitioners.

Mr. Bacon and *Mr. Goren*, for the bankrupt; and

Mr. Russell and *Mr. Cooke*, for the assignees, contended, that Cramp carried on the trade of a cow-keeper for profit, and that this trade was perfectly distinct from, and independent of, the business of the farm, and that he was therefore liable to be made a bankrupt. They also contended, that the petition ought to be dismissed on the ground of the delay in presenting it.

SIR J. L. KNIGHT BRUCE.—This is the case of a farmer who kept cows. I am clearly of opinion that the bankrupt was not a cowkeeper. The petition has been presented late, but I cannot say that it is not in time. (His Honour then repeated the dates.) Unless there be some special circumstances, which I have not heard, I cannot refuse relief from the mere dates.

1847. April 22, 28. } *Ex parte* LANE *in re* LENDON.

Partnership—Parol Agreement—Joint Estate.

B, a trader, being indebted to A, entered into partnership with C. After the formation of the partnership, a parol agreement was entered into between A, B, and C, that the debt due from B. to A. should be converted into a debt to be due from B. and C, as partners, to A. Some time after this agreement B. and C. were made bankrupts:—Held, that A. had a right of proof against the joint estate of B. and C, in respect of the debt.

Previously to May 1838, William Lendon the elder, the bankrupt, was indebted to the petitioner, Mary Lane, in various sums, amounting altogether to 4,000*l.* In May 1838, W. Lendon the elder entered into partnership with his son William Lendon the younger, and they carried on business in partnership together, until their bankruptcy.

On the 19th of February 1845, a fiat in bankruptcy was issued against W. Lendon the elder and W. Lendon the younger.

A petition was now presented by M. Lane, praying for liberty to prove in respect of the sum of 4,000*l.* against the joint estate of W. Lendon the elder and W. Lendon the younger, on the ground that, between May 1838 and the bankruptcy, an agreement had been entered into between her and the Lendons, that they, in their character as partners, should be liable to the debt of 4,000*l.*

The affidavits in support of the petition stated various conversations between M. Lane and both the Lendons after May 1838, to the effect that the 4,000*l.* had been embarked in the business which the Lendons carried on; that the Lendons, as partners, had taken the debt due to M. Lane on themselves; and that M. Lane considered them both liable to the debt.

At the hearing of the petition, M. Lane and W. Lendon the younger were orally examined, and their evidence agreed with the statements contained in the affidavits.

Mr. Swanston and *Mr. T. H. Terrell*, for the petitioner.

Mr. Russell, Mr. Bacon, and *Mr. Kinglake*, for the respondents.

The following cases were cited:—

Ex parte Clowes, 2 Bro. C.C. 595.
Ex parte Jackson, 1 Ves. jun. 131.
Ex parte Peele, 6 Ves. 602.
Devaynes v. *Noble*, 1 Mer. 529.
Ex parte Williams, Buck, 13.

Ex parte Kedie, 2 Dea. & Ch. 321; s.c. 1 Law J. Rep. (N.S.) Bankr. 87.
Ex parte Parker, 2 M. D. & D. 911.

SIR J. L. KNIGHT BRUCE.—If A. is a creditor of B, and B. and C. propose to enter, or have entered, into partnership together, and address themselves to A, the creditor of B, and say, "we wish that this debt, due hitherto from B. alone, shall be a debt from B. and C. together," and A. accedes to the proposal, although no writing passes, that agreement is valid and effectual, and is not impeached or affected by the Statute of Frauds. The effect of it is, for a valuable consideration, to extinguish the first, and, for a valuable consideration, to substitute the second for it. Of course the very words I have referred to need not be used; and if there is sufficient evidence that the intention of the parties was so, that will be as effectual as if the most formal expressions had been used. The question of fact then before me is, whether the circumstances of this case, as they are now in evidence, are sufficient to satisfy the Court, as a Judge of fact, that such was the intention of Mr. Lendon the father, Mr. Lendon the son, and Miss Lane, who stood in the position I have mentioned. [His Honour, after referring to some of the evidence, proceeded as follows.] The evidence satisfies me, placing myself in the position of a jury, that it was in effect agreed between the three, that the separate debt of the father should become the joint debt of the father and the son. I am of opinion, that the pecuniary transactions after the commencement of the partnership were on this footing. The conclusion at which I arrive is this—that such sum, if any, as was due at the time of the bankruptcy to Miss Lane, upon this account, was a joint debt from both the bankrupts.

1847. March 8. } *Ex parte* SHUCKARD *in re* ARCHER.

Costs—8 & 9 *Vict. c.* 127. *(Act for Securing Payment of Small Debts).*

The expression "costs remaining due at the time of the order of imprisonment being made," in the 8 & 9 *Vict. c.* 127. *s.* 3, *means the costs ordered by the commissioner of bankruptcy or other court mentioned in the act to be paid by instalments or otherwise; and the expression "all subsequent costs," in the same section, means the costs incurred by reason of the debtor's default in payment of the instalments.*

By the 8 & 9 Vict. c. 127. s. 1. it is enacted, "that if any person is indebted in a sum under 20*l.*, besides costs of suit, by force of any judgment, the creditor may obtain a summons from any commissioner of bankruptcy for the district in which the debtor lives; and the debtor appearing before the commissioner, shall be examined, &c.; and that it shall be lawful for the commissioner to make an order on the debtor for the payment of his debt by instalments or otherwise; and in case he appears at the time to have the means of paying the debt by instalments or otherwise, and shall not pay the same at such times as the commissioner shall order, then it shall be lawful for the commissioner to order such debtor to be committed to gaol for any term not exceeding forty days." By section 3. it is enacted, "that any person imprisoned under the act, who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and *costs remaining due at the time of the order of imprisonment being made*, and *all subsequent costs*, shall, upon entry of payment indorsed on the order of imprisonment, be discharged."

A judgment was obtained against Mr. Shuckard, at the suit of Mr. Vizetelly, for a debt of 3*l.*, with 5*l.* 2*s.* costs. In the matter of this debt Mr. Archer acted as the solicitor of Mr. Vizetelly. Mr. Shuckard having made default in the payment of the debt and costs, an application was made in respect of them, under the 8 & 9 Vict. c. 127. s. 1, to Mr. Evans, one of the commissioners of bankruptcy. An order was thereupon made, dated the 17th of February 1846, whereby, after reciting that Shuckard was indebted to Vizetelly in 3*l.*, besides costs of suit, and that he had been summoned, and had appeared, and had been examined, and that it appeared that he had the means of paying the said debt and

costs, it was ordered that he should pay the said debt and costs in manner following:—The sum of 1*l.*, &c. (mentioning monthly instalments) until the said debt and costs were fully paid.

Mr. Shuckard paid five instalments, but made default in the two following ones. Upon this, a further application was made, under the act, by Mr. Archer, as solicitor of the creditor, to the commissioner *ex parte*, and the commissioner issued a warrant for the imprisonment of Mr. Shuckard.

The warrant being in Mr. Archer's hands, Mr. Shuckard came to Mr. Archer's office on the 14th of October, and offered to pay the instalments due. He was then told in reply that unless he paid about 7*l.* for costs the warrant should be enforced; and, under protest, and to avoid being taken to gaol, he paid the sums demanded. On the 20th of October Mr. Archer sent a bill of costs to Mr. Shuckard's solicitor.

Mr. Shuckard, considering himself aggrieved by the conduct of Mr. Archer in respect of the demand as to costs, filed an affidavit in the Court of Review, stating the above facts; and also stating some circumstances explanatory of his having made default in the payment of instalments. On motion made upon this affidavit, an order was made by the Court that Mr. Archer should answer the matters contained in the affidavit, and that the matter should be put in the paper of motions and petitions.

The matter now came on to be heard—

Mr. Swanston and *Mr. Tripp* for Mr. Shuckard;

Mr. Wigram and *Mr. Cooke* for Mr. Archer.

Sir J. L. Knight Bruce asked if both parties were willing to treat the matter as an application to tax the bill of costs delivered on the 20th of October.

Both parties agreed that the matter should be so treated.

A discussion then took place (with a view to the principle on which the bill should be taxed,) as to the meaning of the expressions in the 3rd section of the act, "costs remaining due at the time of the order of imprisonment being made," and "all subsequent costs."

Sir J. L. Knight Bruce (after conferring with Mr. Commissioner Fane) said, that he thought that the expression "costs remaining due at the time of the order of imprisonment being made," meant the costs to be paid by instalments mentioned in the order for payment (1); and that the expression "all subsequent costs" meant the costs incurred by reason of the debtor's default in payment of the instalments. That was his view: he thought, however, that the question of the construction of these expressions was a difficult one. He could make no order on these points, but his opinion might be mentioned to the taxing officer.

The common order for the delivery and taxation of Mr. Archer's bill was then made, the consent of both parties being recited in the order.

1847. May 26. } *In re* MARTIN.

Bankrupt, Examination of—Committal—Warrant.

A bankrupt was examined before one of the London Commissioners, and, not having satisfactorily answered the questions put to him, was committed to the custody of a messenger of the court. The bankrupt was afterwards brought before a subdivision Court, by which Court, after another examination, he was committed to Newgate. After his committal the bankrupt was brought up before Mr. Commissioner S, in whose jurisdiction the fiat was, and after some questions put and answers given, was re-committed to Newgate on the old warrant:—Held, that the bankrupt was entitled to his discharge, on the ground that a record ought to have been made of his last examination before Mr. Commissioner S.

The warrant of committal by the subdivision Court directed the keeper of the prison to keep the bankrupt "until such time as he shall submit himself to us, or to any of the Commissioners of the Court of Bank-

(1) Excluding, therefore, the costs of the application to the commissioner for the order for payment.

ruptcy, and answer make to the questions put to him by us."—Whether the warrant was not, on this account, legal, quære.

This was a motion for the discharge of a bankrupt, who was in custody, and who was now brought before the Court on a writ of *habeas corpus*.

By the 6 Geo. 4. c. 16. s. 36. it is enacted that it shall be lawful for the Commissioners to summon any bankrupt before them, and to examine such bankrupt upon oath as to his estate, &c., and if the bankrupt shall refuse to be sworn, or shall refuse to answer any question, or shall not fully answer to the satisfaction of the Commissioners any such questions, or shall refuse to sign and subscribe his examination, it shall be lawful for the said Commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain until he shall submit himself to the said Commissioners to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination.

By the 1 & 2 Will. 4. c. 56. s. 1. it is enacted that it shall be lawful for His Majesty to appoint six persons to be called Commissioners of the Court of Bankruptcy.

By section 6. it is enacted, that the said six Commissioners may be formed into two subdivision courts, consisting of three Commissioners for each court, for making the examinations thereinafter referred to.

By section 7. the six Commissioners are empowered to act in the same manner as the Commissioners under the previous Bankrupt Acts, with this proviso: "Provided always, that no single Commissioner shall have power to commit any bankrupt or other person examined before him, otherwise than to the care and custody of a messenger or other officer of the said court, to be by him detained in his custody, and brought up before a subdivision Court, or the Court of Review, within three days after such commitment, for which purpose one of such Courts shall be forthwith assembled, and to which Court such examination shall be adjourned."

By the 5 & 6 Will. 4. c. 29. s. 25. it was enacted, that the subdivision Courts should be deemed to be courts of record, and should have all such powers of commitment as were vested in Commissioners of Bankrupts, acting as such, at the time of the passing the act, 1 & 2 Will. 4. c. 56.

A fiat issued against the bankrupt in March 1847, and Mr. Shepherd was the Commissioner under the fiat. The bankrupt was examined before Mr. Commissioner Goulburn as to some money alleged to have been lost; and, not having satisfactorily answered the questions put to him, an order was made that he should be committed to the custody of one of the messengers of the court, to be detained by him in custody and brought before a subdivision Court.

The bankrupt was on the 25th of May brought before a subdivision Court, consisting of Commissioners Goulburn, Holroyd, and Fonblanque; and, after another examination, was committed by such Court to Newgate.

The warrant of commitment, which was signed by the Commissioners forming the subdivision Court, after setting out the fiat, adjudication, and surrender, stated that Mr. Commissioner Goulburn had put certain questions to the bankrupt, and that the answers were unsatisfactory (not, however, setting out the questions and answers); and that the bankrupt had been committed to the care of the messenger of the court, and that he had been brought before the subdivision Court, and had been examined. The warrant then set out the questions put to the bankrupt by the subdivision Court, and the answers, and then proceeded as follows:—"Which answers of the said William Martin not being satisfactory to us, the said Commissioners, these are therefore to will, require, and authorize you, immediately upon receipt hereof, to take into your custody the body of the said William Martin, and him safely to convey to Her Majesty's Prison of Newgate, and him there to deliver to the keeper of the said prison, who is hereby required and authorized by virtue of the statutes aforesaid to receive the said William Martin into his custody, and him safely to keep and detain, without bail or mainprize, until such time as he

submit himself to us, or to any of the nissioners of the said Court of Bank-:y, and full answer make, to our or satisfaction, to the questions so put to by us as aforesaid; and for so doing shall be your sufficient warrant."

On the 25th of April the bankrupt was ken from Newgate before Mr. Commis-oner Shepherd, and, after having signed a eclaration in lieu of an oath, was asked by he Commissioner if he had any additional statement to make as to the loss of the money. The bankrupt replied, that he had an additional statement to make, which was, that he had informed his brother of the loss ten days after it had occurred. The Commis-sioner asked if that was all, and the bankrupt having replied that it was all, the Commis-sioner said that the additional statement did not alter the case. The bankrupt was then sent to Newgate upon the old warrant of commitment.

The bankrupt was now brought before the Court on a writ of *habeas corpus* granted by Sir J. L. Knight Bruce, as Vice Chan-cellor, in order to have the question de-termined whether he had been properly committed.

The bankrupt had shortly before been brought up on a writ of *habeas corpus* before Mr. Justice Erle; who, on hearing some of the arguments that were adduced on the present motion, ordered him to be remanded (1).

Mr. Swanston and *Mr. Sturgeon* now moved that the bankrupt should be dis-charged on the following grounds:—first, that it did not appear on the warrant that the subdivision Court had been duly sum-moned and constituted; secondly, that the first examination before Mr. Commissioner Goulburn ought to have been set out at length; and thirdly, that Mr. Commissioner Shepherd, instead of re-committing the bankrupt on the old warrant, ought to have committed him to the custody of the mes-senger, to be again brought up before a subdivision Court. The warrant of com-mittal by the subdivision Court expired on the bankrupt being brought up before Mr. Commissioner Shepherd.

They cited—
Coombes' case, 2 Rose, 396.
Brown's case, Ibid. 400.
Crowley's case, 2 Swanst. 1.
Ex parte Lampon, 1 Mont. & Ayr. 245.

Mr. Bacon and *Mr. Duncan*, contrà, cited *In re Martin*, Bail Court, Easter term 1846 (being the same case before Mr. Jus-tice Erle).

Sir J. L. Knight Bruce.—I think that the bankrupt is entitled to his discharge. It is not in my opinion necessary that the further examination of the bankrupt should be satisfactory to the three Commissioners who formed the subdivision Court which committed him, but that, upon his submis-sion to be examined by the Commissioner, to whose particular jurisdiction the fiat be-longed, and, being examined to his satis-faction, the bankrupt would be entitled to his discharge by such Commissioner.

If this view be correct—and, being a view in favour of freedom, it is the view which in a case of ambiguity, if ambiguity there is, ought probably to be taken—then I doubt the legality of the warrant in this case, inasmuch as it is a commitment "until such time as the bankrupt submits himself to us or to any of the Commissioners of the Court of Bankruptcy, and full answer make to our or their satisfaction."

It is not, however, necessary to decide this, and I avoid deciding it—I decide merely that the bankrupt, having appeared before Mr. Commissioner Shepherd, and having submitted to be examined upon the subject, for not answering satisfactorily t which he has been committed, Mr. Shephe being the Commissioner to whom the f originally belonged, he being willing receive, and sitting there to receive, further information as the bankrupt willing to give, there ought to have be record made of such examination; an not having been done, the bankru entitled to his discharge. This view case is supported by the authority o Eldon in the cases cited, and is sar also by reason and good sense. Th rupt is entitled to his discharge.

(1) See *post*, Q.B. 286.

1847. May 26. } *Ex parte* MORSE *in re* LAYT.

Setting aside Choice of Assignees.

A fiat issued against a bankrupt on his own petition. At the meeting of creditors for the choice of assignees, A. tendered a proof of a debt, which was adjourned by the Commissioner. The choice of assignees was then proceeded with. The solicitor who had been concerned for the bankrupt represented all the other creditors at this meeting. A. was afterwards admitted to prove for the whole of his debt. On the petition of A. the choice of assignees was ordered to be set aside.

A fiat in bankruptcy issued against the bankrupt on his own petition under the 7 & 8 Vict. c. 96. s. 41.

At a meeting of the creditors for the choice of assignees, the petitioner, Mr. Morse, tendered a proof of a debt alleged to be due to him from the bankrupt. The Commissioner, not being satisfied with the evidence adduced by Mr. Morse in support of his claim, adjourned the proof. The choice of assignees was then proceeded with. At this meeting all the other creditors were represented by the solicitor who had been employed by the bankrupt in the matter of the fiat.

The petitioner then presented a petition praying that his proof might be admitted, and that the choice of the assignees might be set aside.

Upon a reference made to the Commissioner, upon this petition as to the debt, the proof was admitted.

The petition now came on to be heard as to the question of setting aside the choice of assignees.

Mr. Russell, for the petitioner.

Mr. Swanston, for the assignees.

Sir J. L. KNIGHT BRUCE.—I proceed in this case on the ground that the fiat was issued on the petition of the bankrupt himself, and was not applied for by any petitioning creditor:—on the further ground that all the creditors who voted at the choice of assignees were represented by the bankrupt's solicitor, who, in that character, had sued out the fiat:—on the further ground that, under the present law all the bankrupt's estate vests in the official assignee from the moment of adjudication; and lastly, on the ground that the petitioner has been admitted to prove for every shilling of the debt which he applied to prove for at the meeting for the choice of assignees. For these reasons, and under the special circumstances of this case, I think that the choice of assignees ought to be set aside, and that a new choice should be made.

1847. June 2. } *Ex parte* FLOWER *in re* FLOWER.

Election—Proof of Debt.

A creditor, who had proved his debt and joined other creditors in opposing the granting the bankrupt his certificate, restrained from suing the bankrupt for the debt in a small debts court.

This was the petition of the bankrupt, praying that one of his creditors might be restrained from suing him for a debt in the Clerkenwell Small Debts Court.

It appeared by the affidavit in support of the petition, that the creditor had proved his debt against the estate in December 1846; that he had joined some of the other creditors in opposing the bankrupt's application for his certificate; that the result of the opposition was that the granting the certificate was suspended for six months; and that he had, after these proceedings, and in April last, brought his action for the debt in the small debts court.

Mr. M'Naghten, for the petitioner.

Mr. Swanston, for the respondent, contended, that he had the right of election at the time of his bringing the action.

Sir J. L. KNIGHT BRUCE said, that the respondent, by proving under the fiat, had made his election; in addition to this he had made use of his power under the fiat, as creditor, to delay the granting the bankrupt his certificate. The injunction must be granted with costs.

1847. July 5. } *Ex parte* HALL *in re* CAREY.

Official Assignee—Proof of Debts.

It is the duty of the official assignee to examine the lists of creditors prepared by the solicitors to the fiat, before he signs them; and he is liable for the consequences of the omission of any creditors from the lists.

A fiat in bankruptcy issued against the bankrupt Carey on the 4th of April 1842, and the respondent, Mr. Belcher, was appointed official assignee in the bankruptcy.

The petitioner, Mr. Hall, claiming to be a creditor of the bankrupt for 353*l.*, tendered a proof for his debt at one of the early meetings. The matter was adjourned for want of sufficient evidence; but on the 25th of April 1846, the proof of the debt was allowed, and filed with the proceedings.

By the 24th of the Orders in Bankruptcy of the 12th of November 1842 (1), it was ordered that, when a dividend might be declared, the solicitor to the estate should make out three lists of creditors in the manner described in the Order, and should sign such lists, and should cause one of such lists to be filed with the proceedings, and should deliver to the official assignee the other two lists; and that the official assignee should examine and sign the several lists, if correct, and should prepare books containing as many blank warrants as might be necessary, and should send the books containing the warrants to the accountant in bankruptcy, who, after such examination as therein mentioned, should return them to the official assignee for delivery to the creditors.

On the 3rd of April 1846, the official assignee delivered to the Commissioner a statement of the bankrupt's estate, and the Commissioner, on the same day, ordered that a dividend should be made of 1*s.* 0¼*d.* in the pound. The solicitor to the fiat made out lists of the creditors, as required by the 24th Order, and delivered them to the official assignee, who signed them. The official assignee then prepared the dividend warrants, and sent them to the accountant in bankruptcy, who signed them, and returned them to the official assignee for delivery to the creditors.

(1) 12 Law J. Rep. (N.S.) Bankr. 17.

On the 29th of May the solicitors of the petitioner, by his direction, applied for his warrant, on which occasion they were informed that the petitioner's debt had, by mistake, been omitted from the list, and that all the estate of the bankrupt had been distributed, and that there was no outstanding estate.

The petitioner now presented a petition, stating the above facts, and praying that it might be declared that the official assignee was liable to the petitioner for the amount of his dividend, and that an order might be made for the payment of such dividend and the costs of the petition.

Mr. Russell and *Mr. Tillotson*, for the petitioner.

Mr. Bacon and *Mr. Willes*, for the official assignee, contended that he was not liable to pay the petitioner the dividend in question; and cited the 6 Geo. 4. c. 16. s. 111, and the 1 & 2 Will. 4. c. 56. s. 22.

In the course of the argument, the Chief Judge asked the counsel for the official assignee whether it was desired that the solicitors to the fiat should be served, in order to enable the Court to decide the question whether they should be responsible for the omission or share the responsibility. This was declined by the counsel for the official assignee.

Mr. Commissioner Fonblanque was present at the hearing of the petition.

Sir J. L. KNIGHT BRUCE.—The official assignee declines to ask that the matter shall stand over for the service of the petition upon the solicitors to the fiat—[His Honour then read the 24th Order in Bankruptcy, of the 12th of November 1842]. I take it this could not be done without the lists being perfected in the presence of the official assignee. My impression is, that it is the duty of the official assignee not to sign the lists without ascertaining that they are correct. I am confirmed in the view I take of the matter by Mr. Fonblanque, who is so well acquainted with the practice and the whole course which this matter has taken. Therefore, the official assignee not asking that the solicitors may be brought here, either to take the whole burden or to share it with him, I am afraid that I must charge the respondent. The petitioner can have only as much as he would have had if

his debt had been included in the calculation; and the official assignee will recoup himself out of the estate which has come in, or may come in.

There is not the slightest ground for any imputation of negligence on the part of the official assignee. I make the order without any imputation upon him. He is, I understand, an excellent officer. This is an unlucky slip, of which he may not have been the original author. I am afraid the official assignee must pay the costs. I make this order with the greatest respect. Mr. Fonblanque, who is the highest possible authority on that subject, considers him to be an excellent officer. I do not know what order the Court would have made if the solicitor had been brought here. I hope that, in future, official assignees will consider it their duty to ascertain that the lists agree. I have no doubt that there is not another official assignee, whether in town or country, who, under the same circumstances, would not have fallen into the same error. I trust, however, that, when it is known that the Court has put this construction upon the order, official assignees will ascertain for themselves that every creditor is included.

1847. June 30; July 14. — *Ex parte* MORRISON, *in re* LONDON AND BIRMINGHAM EXTENSION, AND NORTHAMPTON, DAVENTRY, LEAMINGTON, AND WARWICK RAILWAY COMPANY.

7 & 8 *Vict. c.* 111.—*Fiat against a Company.*

By a deed of settlement of a company twelve persons were appointed to be the committee of management; and it was declared that the majority of the members of the committee of management for the time being present as members of such committee, consisting of not less than five persons, should have power to bind the company. A meeting of the committee was summoned, at which three members only attended. At this meeting a resolution was passed that the company was unable to meet its engagements; and a declaration and minute were filed as required by the 7 & 8 Vict. c. 111; and a fiat issued against the company. On a petition presented by two other members of the committee, that the fiat should be annulled,—Held, first, *that the petition could not be heard without serving some other members of the committee who dissented from the views taken by the petitioners; and, (on a further hearing of the petition)* secondly, *that the resolution passed in this case was not a resolution "duly passed," within the meaning of the act 7 & 8 Vict. c. 111, and that the fiat ought to be annulled.*

By the 7 & 8 Vict. c. 111. s. 1, it was enacted, that, if a company registered under the provisions of the 7 & 8 Vict. c. 110. (the Joint Stock Companies Act) should commit an act which should, by the provisions afterwards contained, be deemed an act of bankruptcy, a fiat might issue against the company. By the 4th section it was enacted that, if the company should, by virtue of a resolution to be duly passed in that behalf, at a board of directors of such company, duly summoned for that purpose, file in the office of the secretary of bankrupts a declaration in writing, in the form specified in the schedule, that the company was unable to meet its engagements, and also a minute of such resolution, in the form specified in the schedule, such declaration and minute of resolution being signed by the chairman of the board of directors present at the passing of the resolution, such company should be deemed to have committed an act of bankruptcy, provided a fiat should issue within two months from the filing of such declaration, and that a copy of such declaration and minute, purporting to be certified by the secretary as a true copy, should be received as evidence of such declaration and minute having been filed; and that, upon proof of sealing or signature, no further evidence should be required of such act of bankruptcy.

The London and Birmingham Extension, and Northampton, Daventry, Leamington, and Warwick Railway Company was projected in 1845, and registered under the provisions of the 7 & 8 Vict. c. 110. (the Joint Stock Companies Act). By a deed of settlement (which was not produced at the hearing of this petition, but of which secondary evidence was received by the Court) twelve persons were appointed to be the committee

of management of the company. By one of the clauses in the deed it was declared that the majority of the members of the committee of management for the time being present as members of such committee, *consisting of not less than five members*, should have power to bind all who were absent, as well as those present, as well as the general body of subscribers. An application to parliament for a bill was made in 1846, but proved unsuccessful. At a meeting of the shareholders, held on the 10th of September 1846, it was resolved that the company should be dissolved, but that such dissolution should not amount to an act of bankruptcy. A meeting of the committee of management was summoned to meet on the 17th of March 1847. At this meeting, at which three only of the committee attended, a resolution was passed that the company was unable to meet its engagements. This resolution was signed by Mr. Black, the gentleman who acted as chairman, and a declaration and minute, as required by the act, were duly filed with the secretary of bankrupts.

On the 18th of May 1847, a fiat issued against the company, and they were adjudged to be bankrupts.

This was the petition of Mr. Morrison and Mr. Weiss, two of the committee of management, who had not been present at the meeting of the 17th of March, praying that the fiat might be annulled. The only persons served with the petition were the petitioning creditor and the official assignee.

Mr. Bacon and *Mr. Glasse*, for the petition.

Mr. Russell and *Mr. Hawkes*, for the petitioning creditor and the official assignee, objected to the petition being heard, on the ground that the petitioning creditor and official assignee had alone been served; and that some persons representing the company ought to have been served.

Sir J. L. Knight Bruce.—The petitioners are only two out of a number of twelve persons, who, at the time when I understand the company was dissolved, namely, in September last, were its managing and governing body, its directors or committee of management, or whatever the designation may have been. This state of things is, I understand, admitted. I understand it to be further admitted, that not one of these twelve persons has been served with the petition, except of course, if it be an exception, the petitioners, who presented it; and that of those unserved persons some dissent from the view taken by the petitioners, and desire that the fiat should not be annulled, and that of these some one at least is within the jurisdiction of the Court. In this state of things I think the petition cannot be heard. It is a different question, whether any interim order should be made in regard to the proceedings before the Commissioners. I do not suppose that it has entered into the imagination of any one that it could be necessary to serve all the shareholders. All that the Court requires is, that some substantial person or persons, in the same condition with the petitioners, but taking a different view of the matter, should be served.

An order was made that the proceedings under the fiat should be stayed; the petitioners to serve three of the directors, who were resident in England, and who dissented from the views taken by the petitioners.

Mr. Black and two other directors having been served, the petition came on again to be heard.

Mr. Bacon and *Mr. Glasse*, for the petition.

Mr. Russell and *Mr. Hawkes*, for the petitioning creditor and official assignee; and

Mr. W. Morris, for Mr. Black, contended, first, that the petitioners had no right to present a petition; secondly, that the petitioners were bound conclusively by the filing of the declaration and minute, by virtue of the 7 & 8 Vict. c. 111. s. 4; and, thirdly, that if the petition were properly before the Court, the acts required to be done, in order to constitute the bankruptcy of the company, had been done. They referred to the 9 & 10 Vict. c. 28. ss. 23, 24, 27, 28.

Mr. Swanston and *Mr. Metcalfe*, for the two other members of the committee, declined to take any part in the discussion.

Sir J. L. Knight Bruce.—Of course I think it perfectly competent to the petitioners in this case to present a petition. I cannot imagine how it could be possible to

decide otherwise; leaving the petitioners exposed to the liabilities to which they are exposed by the act of parliament. The next question is, having assumed everything else to be in favour of the petitioners, whether the declaration filed in the office of the secretary of bankrupts, which is the foundation of the fiat, was filed "by virtue of a resolution duly passed in that behalf at a board of directors of such company duly summoned for that purpose." If it was not, the fiat must fail, whether exposed or not exposed to any other objections. Now, with regard to that it has been said, that this act (7 & 8 Vict. c. 111) makes that which has taken place conclusive evidence that the declaration was filed by virtue of such a resolution; I am not of that opinion. The 4th section makes certain matters receivable as *primâ facie* evidence of the requisites which it mentions, but it does not make them conclusive evidence. It does not take away from any interested party the power of contesting it, and the opportunity of shewing, by other evidence, that such a state of things did not exist. The main question upon this part of the case is, whether that state of things is here shewn? Now, by an instrument, not produced, but the absence of which is, I conceive, sufficiently accounted for, and whose contents are, in my judgment, sufficiently proved, a number of persons, considerably exceeding five, are appointed to be the general committee of management for prosecuting the undertaking. Various powers are given to that committee, and various acts which they are to do are mentioned, and, until we come to the clause which I am about to mention, I do not understand that the instrument gives any power to any one or more of that number to bind the rest, or to act without the rest. There is, however, this clause—"And it is hereby declared, that the majority of the members of the committee of management for the time being, being present as members of such committee, consisting of not less than five members, shall have power to bind all who are absent, as well as those present, as well as the general body of the subscribers." Now, when the act was done, the validity of which is here in question, there were certainly more than five members of the committee who not only were capable of being summoned, but were actually summoned, and who could have attended. In point of fact, however, only three of them did attend, and the three did the act, or professed and attempted to do the act. Now, as these three persons were unanimous, it has been contended, that, inasmuch as five might, if present together, have effectually done the act by means of the majority of three, notwithstanding the dissent of the two, and the number of three was here present doing the act unanimously, that is sufficient. I am perfectly certain that, in this case, and in analogous cases, the unanimous acts of the three, being alone, are different from the acts of three (being a majority of five), who act in the presence of the other two, delivering, or capable of delivering, their reasons, and of arguing the point with them. It appears to me, therefore, that it is no answer to say that, if five were present, the three might have done the act. The five were not present. I am of opinion that, if any sufficient reason could have been given, none has been given for a meeting of the three only—that is, a meeting, for any effectual purpose, of the three only. I think that, for any material purpose, at least under the circumstances which existed (for it is not necessary to consider any other probable state of circumstances), a meeting consisting of less than five members could not do this act or any such act. I am of opinion, therefore, that it is proved that the declaration in writing, which is the foundation of the present fiat, was not filed "by virtue of a resolution duly passed in that behalf at a board of directors," and that, consequently, the fiat fails. The petitioning creditor must pay the costs.

1846. Nov. 11. } *Ex parte* BROMAGE *in re* JONES.

Official Assignee—Costs.

A petitioner, in the matter of a petition for the sale of some property which had been mortgaged to him by the bankrupt, employed the solicitor who acted for the creditors' assignees. The official assignee appeared at the hearing of the petition by separate counsel:—Held, that the official assignee was, under the circumstances, entitled to the costs of such separate appearance.

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—— See Costs. Legacy. Next Friend. Waste.

Bill—Plaintiff not entitled to common order of course to dismiss bill, upon payment of costs, where demurrer has been overruled with costs, and defendant has appealed, 265

—— Words "last of the answers" in 114th Order of May 1845, mean last answer of defendant who moves to dismiss, 286

—— Practice of Court as to dismissing bill and refusing secondary relief, where allegations are made of fraud which is not proved, 429

—— Supplemental bill—pleading—bill, retention of, for twelve months — proceedings at law — outstanding terms—supplemental bill where irregular, 445

—— Upon motion to dismiss for want of prosecution by defendant, who has put in his answer, and objection by plaintiff that three out of sixteen defendants had not yet answered the bill,—plaintiff not having used due diligence in getting in answers, bill must be dismissed, unless plaintiff would undertake to proceed immediately, 448

—— Where case of wilful default by executor charged by bill, and stated in answer of defendant, codefendant, notwithstanding decree for common accounts in original suit, entitled to file supplemental bill, and to have inquiries directed whether there had been any wilful default. Annuitant no means of obtaining relief against executor at hearing, and supplemental bill properly filed, where suit instituted by residuary legatees against sole executor of testator, and against an annuitant, for administration of testator's estate, whole of which was made subject to the annuity;—Bill charged executor with want of diligence, and with wilful default, and that loss had been sustained in consequence of such wilful default, and asked for consequential relief. By answer executor stated facts which shewed that there were grounds for charges in bill, but no evidence was brought forward by plaintiffs to support charges, and a decree for common accounts alone was made; prosecution of the decree having been committed to annuitant, a defendant in original suit, it was ascertained that there had been a loss, and that there was a case for inquiry; and executor having died, annuitant filed a supplemental bill against his executors, charging executor with wilful default, and that at time of decree there was a case for inquiry, and praying the consequent relief, 506

Bill-holders. See Jurisdiction.

Bill pro confesso. See Orders.

Brokerage. See Mortgage of Ships.

Charitable Association—Allowance of demurrer, for want of equity, to bill by certain members of lodge of association called Odd Fellows, against chief officers of association, grand master and secretary of district, some members of lodge who had differed from plaintiffs, and lodge trustees, who had in their hands a sum of money arising from subscriptions;

stating that plaintiffs, had been improperly excluded from society, and praying for declaration that such exclusion was void, and for determination as to their rights to money in hands of trustees, 476

Charity—P. B, by his will, in June 1599, directed his executors to lay out 2,400*l.* in building a school at Tiverton; that in said school should not be taught above 150 scholars at any one time, and these to be of children born, or for the most part before their age of six years brought up, in town of Tiverton, and if said number be not filled up, want should be supplied with children of foreigners, to be admitted with assent of ten householders, as for the time being should be most in subsidy books of the Queen, and no boy should continue in school above age of eighteen, or be admitted under age of six years, and none under a grammar scholar. Testator then gave directions as to payment of schoolmaster and usher, and desired that they would hold themselves satisfied and content with recompence he had provided for their travail, without seeking or exacting any more, either of parents or children, his meaning being that it should be for ever a free school, and not a school of exaction. Testator gave other sums for establishment of scholarships at the universities. Upon information against trustees of charity for a scheme for general regulation and management of funds, and for an alteration in the system of education, reference to Master to inquire into and state annual income of charity; and it was declared that schoolmasters ought not to receive payments for scholars or take boarders; that none but boys educated as free scholars were eligible to scholarships and exhibitions; and that testator, by term "foreigners" meant any children not born or brought up in the parish. Master to inquire what salaries ought, under such circumstances, to be paid to schoolmasters, and if their number ought to be increased; and whether it would be desirable to apply part of funds in providing instructions in matters of science and literature, and in modern languages, and to declare what new qualification should be prescribed for ten householders in lieu of subsidy books as directed by will, 34

—— Information filed by Attorney-General in 1710 to recover lands, formerly chantry lands, granted by King Edward VI. for Morpeth School, against Thornton family, to whom lease of the lands for 500 years had been granted in 1685. Commission issued to ascertain identity of lands, but commissioners reported that they were unable to ascertain which were the chantry lands. No final decree, in consequence of a compromise between the parties, by which it was agreed that 100*l.* per annum should be paid to charity, and that an act of parliament should be obtained to carry compromise into effect, but that if act should not be obtained within two years, then agreement should not be binding. No such act was passed, but owners of property continued to pay 100*l.* per annum for 130 years. On information filed in 1833, to have benefit of proceedings commenced in 1710, and praying that lease for 500 years might be set aside, and chantry lands be ascertained:—Held, that stipulation as to obtaining act of parliament not having been performed, parties were in the same situation as at first, and the relators entitled to benefit of proceedings under original information, and an inquiry ought to take place to ascertain what portion of lands would be of equal value to those granted by Edward VI., 521

—— Administration of funds of. See Ecclesiastical Commissioners.

—— See Executor. Jurisdiction. Legacy. Mortmain. Will.

Children. See Will.

Chose in Action. See Baron and Feme.

Clerical Error. See Amendment.

College Fellowship. See Assignment of Income.

College Statutes. See Jurisdiction.

Company—Provisional committee of projected railway company incur joint liabilities, and are possessed of joint property. A majority agree that 30*l.* shall be paid by each, to raise a fund for payment of all their liabilities. One refuses to pay his 30*l.*, and an action being brought against him by the secretary, with the sanction of the committee, he files a bill against secretary and members of the audit committee who had received the 30*l.* from all who had paid their contributions, alleging that they have sufficient funds for payment of all the joint liabilities, and praying that accounts may be taken of monies come to their hands and of all joint liabilities, and funds in their hands be applied in discharge of their liabilities, and for an injunction to restrain action at law. Demurrer to bill for want of equity overruled; but demurrer for want of parties, on ground that all who had contributed 30*l.*, and all provisional committee-men, were necessary parties to suit, allowed, 1

—— Admission to copyhold, 148

—— Where bill filed against A. as registered public officer of Yorkshire Banking Company, and A. by his answer states that he has ceased to be such public officer, and that B. is the public officer of company under 7 Geo. 4. c. 46. s. 9, it is not necessary to file a supplemental bill, or to obtain any order for the purpose of bringing new public officer before Court. Under circumstances Court ordered production of documents admitted by A. to be in the possession of company, notice of motion being served on A, and new public officer of company, 198

—— Where application of funds of, in opposition to bill in parliament by commissioners, incident to trust. and demurrer for want of equity, to bill filed by landowners liable to contribute to funds of commissioners, to restrain them from making such application, allowed, 255

—— See Legacy. Railway. Will.

Contempt. See Injunction.

Contract—Where party under obligation to pay for additional work not ordered in writing, though building contract provides that no deviations or additions shall be paid for unless ordered in writing, 114

—— A.B. seised of estate, copyhold of inheritance, held of Bishop of Durham, lord of the manor in right of his see, subject to a settlement made by A.B. on his marriage, legal estate being vested in trustees, and tenant for life under settlement, without power to grant leases, agreed to grant a lease of a way-leave for sixty-three years. A. B. died before any lease executed, having, by will, made his wife, tenant for life in remainder of settled estates, his residuary legatee. She instituted suit for administration of husband's estate, and, by virtue of a licence from lord of the manor, under sanction of Court, joined with trustees in granting a lease of way-leave for twenty-one years, reciting licence of lord of the manor, and that two further leases of twenty-one years were to be granted, to make up sixty-three years stipulated for by agreement. Parties then divided the estates and the rent for the way-leave into parts, and sold them in separate lots, the particulars of sale expressing that estate was sold subject to way-leave, and that such leave of way was subject to renewal upon expiration of lease. Purchaser of estate, upon expiration of lease, without consulting purchaser of 182*l.* rent for way-leave over estates, entered into new agreement with lessee of way for its continuance for term of sixty-three years from expiration of said lease, with further

privileges, at increased rent of 252*l.*, and contracted with lessee that he should, under his power in first agreement determine first agreement. After execution of this second agreement, purchaser of estate insisted, that first agreement was satisfied by grant of first lease, and if not, that it determined by second agreement, and claimed whole of rent of 252*l.*, independent of purchaser of rent of 182*l.*, secured by first agreement:—Held, first agreement was a continuing agreement for residue of sixty-three years, and not satisfied by lease granted; that purchaser of estate could not contract to defeat purchaser of the 182*l.* rent, and decree was made that plaintiffs were entitled to rent purchased for so much of two further terms of twenty-one years as might be granted, if lessee should so long continue to use way, 460

Copyhold—By act of parliament under which incorporated company have power to purchase land for formation of a canal, persons having property upon line of canal are to convey any right, title, or interest in such property to the company, by a conveyance in form pointed out by act. A copyholder in fee conveys, under the act, his interest in lands to company. Upon death of copyholder lord of manor is bound to admit his heir, who, when admitted, holds as trustee for company, who are to pay fines and fees upon admission, 148

Copyright—Necessity of statement that contributors have been paid for their contributions, in order to obtain injunction to restrain publication of articles inserted in a magazine, 140

—— Costs of suit to protect copyright follow result of action at law to try validity of copyright, although mode of defence in action at law improper. Bill filed to restrain alleged infringement of copyright, retained, with liberty for plaintiff to try the title by an action at law. Plaintiff having brought his action and failed, bill dismissed *without* costs; but, upon appeal to Lord Chancellor, decree varied by directing bill to be dismissed *with* costs, 261

Costs—Residuary real and personal estate devised and bequeathed upon trust for lives, during which time estates to be kept separate; then to be blended together, and divided among a class. Gift to class fails, and suit instituted by parties claiming both estates as personalty. Costs of the suit to be borne proportionally by real and personal estate; although title of heir-at-law to realty free from doubt, 119

—— Refusal of taxation of, after payment made under protest, 170

—— If cross-bill filed *bonâ fide* by defendant to original suit, against whom original bill is dismissed with costs, costs of it will usually follow decree in original suit, notwithstanding charges of fraud alleged in it are not sustained, 178

—— Where plaintiff's bill ordered to be dismissed with costs, in default of his giving security for, 183

—— of pauper vendor having lien on estate ordered to be paid out of rents, 239

—— on dismissing bill to restrain infringement of copyright, where action at law fails. Appeal for costs only, 261

—— Defendant's costs payable according to old practice, upon filing of answer, upon bill of discovery in aid of defence at law, 267

—— Whether Court will order security for costs, where all plaintiffs out of the jurisdiction, but one sues by a next friend in this country—*quære*, 269

—— of executors, 291

—— Taxation of, as between party and party; special fee on re-hearing to senior counsel; costs of a third counsel, and of all except one of the consultations with counsel preparatory to the re-hearing; and of short-hand writer's notes of the proceedings at the hearing; 120th of the General Orders of 8th of May 1845, 297

Costs—As to taxation of solicitor's bill after payment, 304

—— Where plaintiff had notice of motion to dismiss a bill for want of prosecution, and before the motion was made, the Master gave plaintiff liberty to amend the bill on payment of 10*s.* costs, and defendant brought on the motion for the purpose of obtaining the costs of service of notice,—Held, that defendant was regular, 333

—— Where a plaintiff in one of two suits instituted for the same purpose, has notice of a decree in the other suit, but no order is obtained to stay further proceedings in his suit, and he proceeds—Court, though it will not allow him costs of such further proceedings, will not require him to pay costs thereby occasioned to other parties, 370

—— See Creditors' Suit. Injunction. Mortgage. Vendor and Purchaser.

Counsel. See Costs.

Covenant—Invalidity of proviso in deed of annuity to an unmarried woman, that annuity shall be reduced on her marriage, 113

—— See Trust.

Creditors' Suit—Where plaintiffs in a creditors' suit claimed to have a particular part of testator's estate appropriated towards payment of their debt, expenses attending that claim directed to be borne by plaintiffs; and other creditors not required to contribute towards them, 403

—— See Debtor and Creditor. Vendor and Purchaser.

Cross Bill. See Costs.

Debtor and Creditor—In January 1772 real estates, belonging to Sir J. P. Pryce and Lady P. his wife, respectively, are conveyed to Jaques and Hughes, upon trust to sell and pay off a mortgage debt of 24,000*l.* to Earl Temple, and certain other specified sums, including two debts due from him to J. and H, and out of residue to pay other creditors of Sir J. P. P. In June 1774, under decree in suit of *Earl Temple* v. *Pryce*, mortgage debt of 24,000*l.* is satisfied out of monies arising from sale of estates of Sir J. P. P, and there remains in court in that cause surplus, which, by investment and accumulation, amounts to 20,000*l.* In 1785, inquiry is directed in same cause, on petition of Jaques and others, as to incumbrances on fund in court, but same is not prosecuted. Sir J. P. P. dies in 1776, and Evors, his heir-at-law, enters into possession of his estates and buys up the incumbrances thereon, which had been the debts of Sir J. P. P, at a low price. Lady Pryce dies in 1805, and a suit (*Burney* v. *Scott*) is instituted for the administration of her estate. Jaques and Hughes's debts are paid out of the proceeds of sale of her estates, and amount arising from Lady P's real estate is exhausted in payment of incumbrances prior in date to Burney's. Lady Pryce only a surety for Sir J. P. P, under deed of 1772; notwithstanding lapse of time, Burney's executor entitled to be paid his debt out of fund in court, arising from sale of Sir J. P. P's estates, and personal representative and devisee of Evors (Evors having died in 1844) only entitled to be allowed sums actually expended by Evors in buying up incumbrances on estates of Sir J. P. P. Surplus fund having remained in court, and Evors having, in 1840, obtained order for inquiry as to incumbrances on that fund, Burney's claim not barred by Statute of Limitations, 8

—— A, owner of estates in West Indies, upon which B. had an annuity charged, empowered B. to arrange with firm in London to receive consignments, and, in consideration thereof, to make necessary remittances and to pay charges upon estates. B, as agent

of A, entered into agreement with D. & Co. that they should make such remittances, and provide for charges upon estates (including B's annuity), and that produce of estates should be consigned to D. & Co. in repayment of such advances. Consignments made accordingly, and D. & Co. for some time paid B's annuity, but afterwards refused to continue such payments. On bill filed by B. against A. and D. & Co. for payment of arrears of his annuity out of the consignments, and demurrer, by D. & Co. for want of equity, held that D. & Co., by subsequent payment of B's annuity on footing of agreement, had given him an interest in deed, and a right of suit, and demurrer overruled, with costs, 191

Decree—Where parties entitled to future succession not bound by, 81

—— Court will not vacate inrolment of, on ground of surprise, if party inrolling has done nothing to mislead his opponent, and so induce him not to enter a caveat, 268

Deed—Rectification of, by Court, 31

—— Rule of construction. See Devise.

Demurrer—Bill not restored where plaintiff had unsuccessfully applied to have demurrer taken off file for irregularity, and had not set down demurrer for argument within time allowed by 46th Order of May 1845, 160

—— Demurrer overruled for irregularity, where defendant, who had not demurred to bill within twelve days from his appearance, afterwards put in answer and demurrer to whole bill, and set down demurrer for argument, 480

—— See Charitable Association. Parties.

Depositions—Where party filed bill in this country to perpetuate testimony, to be used in Court of Chancery in Ireland, and question in suit there was ripe for decision, Court here ordered publication of depositions, leaving Court in Ireland to decide whether they were or were not admissible, 286

Devise—What covenants devisee in trust will be compelled to enter into, 102

—— Devise of real estate to trustees, upon trust, to pay rents and profits to testator's daughter for life, and after her decease to convey property unto and equally between and among all and every her children "who should live to attain twenty-three years of age, and to their heirs and assigns for ever; and if there should be but one such child, then to such only child, &c.; and in case there should be no such child or children, or being such, all of them should die under twenty-three, without lawful issue, then over; with power to trustees to apply interest of each child's share for his maintenance, notwithstanding such share should not then be absolutely vested. Attainment of age of twenty-three years part of description of devisees; and devise being to a class, after a life in being, limitations over too remote, 185

—— Testator devises real estate to his son H. A. for life, and to the heirs of his body lawfully begotten, for ever; and in case his said son die without children, then over; H. A. takes an estate tail in the premises, 293

—— Testator, by will, dated 1778, gave all his real estates to his son-in-law, J. R, for life, with remainder to his daughter M. R, for life, with remainders in tail male, with remainders to the daughters of his daughter in tail general, with cross remainders between them; and for default of "such" issue, he gave his daughter an absolute power of appointment over the whole property. In 1841, the daughter, M. R, by deed-poll, duly executed according to the power, reciting accurately the limitations of the will, and that there was no issue of her body, appointed that the property should go, "subject to the life estate of J. R. and M. R. therein, and there being a failure of issue of the said M. R," to the use of the plaintiff in fee:—Held, a valid appointment to the plaintiff; the words "failure of issue" being, with reference to the previous recital that she had no issue of her body, to be construed as a failure of "such issue." The same rule of construction would prevail as well in a deed as in a will, 358

Devise—Words "share and share alike" controuled by circumstances denoting that they are not used to create a tenancy in common. Estates vested in trustees for benefit of three persons, with direction to apply income for the maintenance of *cestuis que trust*, or the survivors or survivor, share and share alike:—Held, to create a joint tenancy. A testator devised freehold and copyhold estates to trustees and their heirs, upon trust, for the use and benefit of his three natural boys. Rents, &c. to be paid for maintenance and education of said before-mentioned boys, or survivors or survivor of them, share and share alike:—No resulting trust, and sons entitled absolutely as joint tenants, 469

—— Trusts of term valid, and accumulations directed within exception of the 39 & 40 Geo. 3. c. 98. s. 2, and trusts do not exceed period allowed by law, where testator devised real estates to trustees for 2,000 years, and, subject thereto, settled estates upon his son for life, with divers remainders over in tail; declaring that trusts of the term were to raise by sale or mortgage money sufficient to make up deficiency of his personal estate to pay debts other than debts due on mortgage and legacies, and to apply rents in payment of interest on mortgages and annuities given by his will, and also to set apart 500*l.* a-year for discharge of incumbrances on his estate; this sum trustees were yearly to invest, and accumulate in stock, and, when sufficient, trustees were authorized to apply same in payment of any mortgage, without waiting until time for accumulation had expired; surplus rents were to be paid to parties entitled to estate, under the limitations; when the trusts were satisfied term of 2,000 years was to cease. Leasehold estates were bequeathed to trustees of term upon trusts nearest corresponding with those declared of real estate, 514

Discovery. See Partition.

Discovery, Bill of—125th Order of 1845 applies to cross bill of discovery filed as a defence to suit in equity, and not to bill of discovery in aid or defence of action at law, 267

Dismissing Bill. See Bill.

Ecclesiastical Commissioners—By 3 & 4 Vict. c. 113. as much of the property belonging to the collegiate church of Wimborne Minster as should, upon due inquiry, be found legally applicable thereto, was by the ratification of a scheme by the Queen in council to be applied for the purpose of making a better provision for the cure of souls in the parish of Wimborne Minster. A portion of the property which was vested in the governors of Wimborne Minster Grammar School, who were defendants to an information filed by the Attorney General, before the 3 & 4 Vict. c. 113, for the administration of the property, was alleged to belong to the collegiate church and to be applicable to the cure of souls within the parish of Wimborne Minster:—Held, that the Ecclesiastical Commissioners had no special jurisdiction in the charity in question, and could not sustain a petition in the suit, seeking liberty to attend before the Master under a decree touching the settlement of a scheme for the disposition of the charity funds, nor could they be deemed

to be parties to the suit; but they were allowed to attend the Master at their own costs, the Attorney General consenting thereto. The Ecclesiastical Commissioners acting under 3 & 4 Vict. c. 113. have no jurisdiction over or in conflict with the Court of Chancery or any other Court, nor have they vested in them any such trust as can be recognized in that court: having no estate or interest in the matters in question, the subject of the suit, 313

Ecclesiastical Court. See Injunction.

Election. See Legacy.

Enlarging Time. See Foreclosure.

Evidence—In suit for contribution in respect of loss sustained in joint mercantile adventure, by one partner against other partners, and executors of deceased alleged partner, plaintiff may examine, on his behalf, one of the partners, defendant, who has been settled with and released by plaintiff, and has also disclaimed all demand against plaintiff and other defendants, 238

—— of one defendant in behalf of another, both having same case, inadmissible, notwithstanding 6 & 7 Vict. c. 85, 246

—— What sufficient evidence of legitimacy of legatee, 281

—— Where a witness, in demurring to interrogatories as to the production of letters and documents, stated, that the letters did not refer to any particular estates to be settled, and that they were received in his character of confidential solicitor; that the documents contained particulars of confidential matters between himself and his clients,—Held, that the subject of the communications, or that they were actually of a confidential character, was not sufficiently shewn, 330

—— Evidence of a witness taken in a suit in which the next tenant for life in remainder was the plaintiff, there being no suggestion either that the witness examined is dead, or unable to be examined,—not allowed to be read in a suit in which the first tenant in tail is plaintiff, 346

—— Parol, to raise and remove latent ambiguities, 491

—— See Witness.

Exceptions—20th of May defendant filed plea as to part of bill, and an answer as to remainder. 29th of June plea, after argument, overruled. 18th of July plaintiff took exceptions to answer for insufficiency, and on 29th, obtained order of course, at the Rolls, for referring them to Master. Motion by defendant to take exceptions off the file, on the ground that they were not filed within six weeks after answer filed, and to discharge order of Master of the Rolls, refused with costs. Where plea and answer filed to bill, and plea is argued and overruled, time limited by 16th Order of May 1845, article 22, for taking exceptions for insufficiency, runs from overruling of plea, and not from time of filing plea and answer. *Semble*, where, under order of course, made at the Rolls, exceptions for insufficiency are referred to Master, a Vice Chancellor has power of ordering exceptions to be taken off file, 68

Executor—Executors, notwithstanding clause in will giving them power of selection of charitable gifts, cannot apply any part of estate to other purposes than those pointed out by testator in his will, 59

—— On motion by residuary legatees that executor, one of pecuniary legatees under will, should pay into court amount admitted by his answer, executor not entitled to retain amount of his legacy before accounts taken, 179

—— Costs incurred by executors in unsuccessfully defending action by surgeon, who had attended testator up to his death, not allowed to executors; but plaintiffs having gone into evidence as to reasonableness of surgeon's bill, instead of leaving it for inquiry before Master, additional costs occasioned thereby not to be borne by executors. In suit against executors, expenses incurred by going into evidence upon items proper for inquiry before Master, to be borne by plaintiffs, 291

Executor—Where he takes undisposed-of residue for his own benefit, 425

Failure of Issue. See Devise.

Fine. See Charity.

Foreclosure. See Mortgage.

Fraud. See Costs. Partners.

Frauds, Statute of—Where inapplicable to a joint speculation in buying, selling, and improving lands, 126

—— See Statute of Frauds.

Friendly Society—On winding up the affairs of a friendly society and to distribute its funds, pursuant to trusts of deed constituting it, several members were appointed trustees for that purpose; monies to be paid to trustees, of whom plaintiff was survivor, to be deposited with bankers and carried to account of society: bankers to pay such sums as two solicitors, F. and W, by their respective cheques on bankers, countersigned by two members of society named, should require to be paid. The principal part of fund was distributed in that manner, and balance in the bankers' hands was irregularly drawn out and invested in names of F. and W, and two members appointed to countersign cheques. On bill filed by last survivor of trustees of fund against F. and W. and personal representatives of two members appointed to countersign the cheques, praying restoration of fund by F. and W, with a view to its future administration, not seeking the administration of it by Court, an objection for want of parties by F.'s answer, on ground that all members of the society ought to be before Court, disallowed, 457

—— See Charitable Association.

Fund in Court. See Administration.

Gift—Restricted or absolute. See Legacy.

Guardian—Appointment of, without suit or reference, 147

Guardian and Ward—Proceedings at law stayed where claim originated in obligations entered into by a young lady who had attained her majority about eighteen months previously, and who was and had been for some time residing in the house and under the care of her near connexion and late guardian; obligation being for sole benefit of guardian and obligees, who had a common interest with him, the latter knowing the relationship in which the lady stood to the guardian, and taking no steps to ascertain whether she acted upon her free will and with full knowledge of the liability she was incurring, 95

Guardians. See Witness.

Habeas Corpus. See Infant.

Heir-at-Law—After decree for account of personal estate, and, in case of deficiency of personal estate to pay debts, for sale of descended real estate, order, on further directions, on proceeds of personal and real estates proving insufficient to pay debts, that heir-at-law of intestate should account for rents and profits received by him of descended real estate, 176

—— See Legacy.

Inclosure—Act empowering commissioners to inclose lands in township of A, and reciting that it would be of great advantage to proprietors of such open lands that same should be allotted and divided,

and enacting that it shall be lawful for commissioners to set out and make such ditches, watercourses, &c., of such extent and form, and in such situations as they deem necessary in lands to be inclosed, and to enlarge and improve any of the existing watercourses, &c., does not justify commissioners in draining water from lands to be inclosed into an ancient watercourse running through township of B. into township of A, so as to obstruct drainage of plaintiff's lands in township of B, by means of said ancient watercourse, to his damage and injury, 274

Income Tax. See Vendor and Purchaser.

Infant—Service of petition to change trustees on, 72

—— Appointment of guardian of estate on petition, without suit or reference, 147

—— Doctrine as to liability of persons after attaining their majority, in respect of dealings during infancy, in which they had been silent as to their age. No remedy against broker or infant, where broker sold railway shares, registered in name of B, to C, and delivered to C. certificates for shares, and a transfer-deed signed by B; and C. paid to broker the purchase-money for shares, and on an application by C. at company's office to register shares, he was informed that it could not be done, in consequence of a notice having been given to company not to register shares, on ground that B, at date of transfer, was an infant, 205

—— Jurisdiction, on petition of parent or guardian, to order infants to be restored to proper custody without a bill being filed. Refusal of Court, where husband obtains *habeas corpus* against wife's trustees for delivery of children, and trustees state that children are not in their custody, or under their controul, to make any order against trustees, although they are aware of residence of mother; or to controul their right to transmit dividends to her, 309

—— See Staying Proceedings.

Injunction—to stay proceedings at law arising out of obligations entered into by ward under improper influence of guardian, 95

—— Party proceeding in action at law, notwithstanding injunction, under impression that it no longer existed, not deprived of costs, 124

—— Refusal of injunction to restrain sale of a periodical containing articles copied from plaintiffs' Gazette, plaintiffs not making out title to copyright in articles required by 5 & 6 Vict. c. 45, by reason of omitting statement that contributors had been actually paid for their contributions. Liberty to plaintiffs to bring an action, 140

—— to restrain tenant for life from destroying ornamental timber of old mansion, where he has built a new one, 201

—— Special injunction to stay trial at law not to be granted until common injunction has been obtained upon default, 258

—— Where on bill alleging case of prospective injury, injunction is granted, restraining defendants from permitting certain injurious effects to be produced by certain given causes, and contemplated damage takes place, and plaintiff moves to commit for breach of injunction, whereupon the defendants deny that damage was effected by their acts, Court will not treat defendants as contumacious until verdict of a jury has conclusively connected act of defendants, and damage alleged to have resulted therefrom, as cause and effect, 274

—— Second trial at law, where granted, 283

—— Where ecclesiastical court issued citation for recalling letters of administration,—injunction to restrain administrator from transferring stock of his intestate's estate refused, no danger being likely to arise therefrom to the estate, 371

Injunction—Plaintiff is not entitled to move *ex parte* after having served defendant with subpœna, 437

—— Plaintiff, having filed bill, gave notice of motion for injunction, which stood over, at request of defendants, that they might file affidavits. Before motion heard, defendants put in demurrer, which was overruled; but, upon appeal, demurrer allowed, and plaintiff was ordered to pay costs of demurrer and costs of suit. Defendants not entitled to their costs occasioned by motion for an injunction, 526

—— See Annuity. Railway.

Insolvent—Title of insolvent mortgagor, who had obtained his final order and petition under 5 & 6 Vict. c. 116, to file bill against mortgagee and official assignee to redeem, 137

Insolvent Plaintiff. See Witness.

Insurance—Where a person, previous to his marriage, covenanted with certain persons as trustees for keeping on foot a policy of insurance effected by him on his own life, and which contained a proviso, that it should be void in case he should die by his own hand, and he was afterwards drowned, and in an action at law, directed by the Court to be brought by the executors of the settlor against the assurance company, the jury found "that the settlor threw himself into the River Thames, intending to destroy himself, but that at the time of committing the act he was incapable of judging between right and wrong":—Held, that the trustees of the settlement were not entitled to claim as against the settlor's estate the sum secured by the policy, 337

—— W. C. O. deposited policy of assurance upon his life with W. O. to secure a debt and any further advances. Notice of deposit was given to directors of assurance office; W. C. O. afterwards assigned policy to W. O, and appointed him his attorney to receive what should be due upon policy, and declared that it should not be necessary for assurance office to inquire if any money was due to assignee, and it also empowered W. O. to give receipts for the money. On decease of W. C. O. assurance office refused to pay policy; claimed a set-off by their letter, but directors did not venture to insist upon it by their answer. They also alleged that signature of executor to any receipt for the money was requisite, and insisted that he was a necessary party to the bill; and he was accordingly made a party to bill, but disclaimed any interest in the money:—Held, that plaintiff's title to receive the money was without doubt, and in general terms; that company was bound to pay whole sum assured, with interest at 4*l.* per cent. from three months after the decease of W. C. O, but without costs, there being no substantial object in view by either party except to fix the other with costs, 512

Interest—Where party retaining fund for many years not liable for, 241

—— See Principal and Surety.

Interrogatories—Whether party, not under any fiduciary relation to, or having any community of interest with, any other person, who has made a communication to counsel or solicitor professionally, on his own behalf alone, relating to property not the subject of any suit or dispute at the time, can be compelled to disclose such communication — *quære.* Estate settled on A. for life, with remainder to his children as he should appoint. A. appoints to B, the eldest of several children in 1834; and in 1836 A. and B, just of age, in consideration of money stated to be paid to A. and B, mortgage estate. B. makes devise of property to A, and afterwards dies. A. enters into agreement to sell to trustees of will of P, subject to approbation of Court in suit instituted to administer estate of P. By order, at the instance of A, A. is permitted to attend Master on inquiries

as to the title; all parties to produce before Master all books, &c., and to be examined on interrogatories. Interrogatories allowed by Master for examination of A; in which, first, his communications with B respecting the appointment and mortgage are inquired after; and, secondly, his communications with his solicitor respecting them. A. excepts to certificate of allowance:—A. compellable to answer first class of inquiries; but not, in that stage, to answer second class—without prejudice, however, to raising question in subsequent stage, 153

Interrogatories. See Evidence. Witness.

Irregularity. See Vendor and Purchaser.

Joinder. See Parties. Railway.

Jurisdiction—A decree, after ordering payment into court of certain funds, directed inquiries as to scheduled debts, and also as to bills, whether the same were drawn and accepted against certain goods generally, or any particular part thereof, and who were the then holders thereof; and the Master was to be at liberty to publish advertisements for the persons claiming to be the holders of such bills, to come in and make out their claims before him; and further directions were reserved. In pursuance of advertisements, the holders of the bills brought in their claims before the Master, who, by his report, found that all the bills were drawn and accepted against the goods generally in the hands of T. R. The cause coming back upon the report,—Held, that the bill-holders were not entitled to appear on the further directions; and that the Court of equity, by its decree, could only order the fund to be paid over to the bankrupt's estate found entitled to it; leaving the claims of the bill-holders (if any) to be settled under the administration in bankruptcy, 350

—— Vice Chancellor no power to discharge order of course made at the Rolls, 68

—— Want of, as to compelling married woman to execute or acknowledge a conveyance of mortgaged estate, 93

—— As to discharging orders by branch of court to which cause is attached, 233

—— Upon information filed, held, on the true construction of statutes made by the founder of a college, under a royal licence, that there was no trust imposed on the college in favour of a school which could be executed by this Court; that the master and usher of the school were only college officers having certain fixed stipends, and as such subject to the jurisdiction of the visitor of the college for the time being; that they were not entitled to participate in the increased revenues of the college. Where the college are trustees for the maintenance of a free grammar school for the public, the Court having authority to enforce the execution of the trust, any breach of trust will be redressed by it under its ordinary jurisdiction; but if the master and usher of the school are only officers appointed to perform certain duties of the college, and the duty of appointing them is not otherwise annexed to the mere property of the college than by the necessity of paying certain fixed stipends, and not in the nature of a trust the execution of which is in the jurisdiction of the Court to enforce, but the observance of which is to be enforced by the visitor of the college, the breach of duty, whatever it may be, must be redressed by the authority of the visitor, and not by the Court, 391

Land—Partnership in purchasing, 127

Lands Clauses Consolidation Act. See Railway.

Lease. See Trust.

Legacy—Testator directs residuary personal estate to be divided into shares, of which each of his sons is to have two, and each of his daughters one; to his daughters each of them was to have interest during her life, and after her death to go to her lawful heirs. Upon the death of one daughter, without issue, her share forms part of residue of testator's estate, not disposed of by his will, and does not belong to personal representative of deceased daughter, 23

Legacy—Testator bequeaths a sum of money to his wife's nephew for life, and if he die in testator's lifetime, without issue, then same to other parties. Nephew dies in the lifetime of testator, leaving issue: such issue not entitled, by implication, to legacy, 24

—— Construction of will as to exemption from legacy duty of bequest of stock as well as pecuniary legacies, 55

—— Testator directs payment of debts, and then bequeaths sums of money to executors in trust, for benefit of poor persons. Testator at his death is possessed, amongst other things, of shares in certain gas-light, dock, and railway companies, by deeds or acts of parliament, agreed or declared to be personal estate. Pure personal estate of testator being insufficient to fully satisfy all the legacies, shares in several companies applicable to payment of charity legacies, 57

—— Will of testator in part as follows: "All my goods and chattels to be converted into money. I bequeath the sum of 260*l.* a year to Mrs. C. C, my housekeeper, during the term of her life; and remaining interest of my money I bequeath to R. W; in event of his demise to S. W," &c. Annuitant a charge in respect of annuity on capital of residuary estate, and not merely on income, 70

—— Personal estate bequeathed to several persons successively for life, with remainder as one, a married woman, shall appoint, and in default of appointment, "unto and for the benefit of her executors or administrators. She dies without making any appointment. Trust fund forms part of her estate; and, her husband having survived and become entitled to it, liable to probate duty and legacy duty as forming part of his estate, as well as to probate duty as forming part of estate of wife, 99

—— Legacy to child of testator, who was dead at date of will, but left issue surviving testator, within the 33rd section of 7 Will. 4. & 1 Vict. c. 26, so as to prevent a lapse, 111

—— Testatrix, by will, gave the residue to her three sisters; and after their death to be divided between her four nieces named in her will:—Held, that the gift to the nieces vested immediately upon the death of testatrix, 366

—— Testator gave two sums of stock to his widow for life, and after her decease one half of the same stock to be divided amongst his surviving brothers and sister, or their issue, share and share alike. The brothers and sister of testator all died in the lifetime of the widow; and four of them only left issue living at the death of the widow:—Held, that the word "survivor" was to be construed with reference to the period of distribution, and that the issue (including remoter descendants) took in substitution the share their respective parents would have taken if they alone had survived the widow, 367

—— Testatrix gives annuity of 300*l.* to her daughter, together with interest of all she had in the stocks; and at her death she gives the stock to her children, to be equally divided between them, together with the interest to be laid out for their use, in case their mother died before they arrived at the age of twenty-one: in case one died the others were to have share and share alike; the survivor to have the whole, and if they all died before twenty-one,

then she gives the stock to her five nieces: all the children of the daughter attain twenty-one, but four die before their mother.—All the children of the daughter who attained twenty-one take vested interests, although they died in lifetime of their mother, 411

Legacy—Substitution of, by an incomplete testamentary paper, 116

—— Widow entitled to have sufficient sum invested in 3*l.* per cents. to secure annuity of 1,500*l.* a year, where testator, whose property consisted principally of foreign securities, bequeathed to trustees so much of his personal estate as would produce 1,500*l.* a year, which sum was to be appropriated by them at their uncontrouled discretion, and income was to be paid to his widow for life, with any increase or diminution which might take place in its amount, 125

—— Allowance of demurrer to bill for payment of legacy for want of representative of testator, 146

—— Testator, after absolute bequests to three children, bequeaths to his daughter H. 1,000*l.* out of his 3½*l.* reduced stock, and also 70*l.* a year during her natural life, to be paid to her by four quarterly payments after H. attains age of twenty-one years and six months; which two sums he directs and devises to be under trust of his executors, viz., not to permit H. to assign said annuities to any one; and interest arising from the 1,000*l.*, as it becomes due, to be paid to her, for her life, into her own hands, and her receipt to be a sufficient discharge, even if she marries; and at her decease 1,000*l.* to be equally divided between her children. H. is unmarried and a minor at death of testator, but marries after attaining twenty-one years and six months, and then dies, having had no issue. Testator, by his will, devises all his money concerns in the funds, or in notes or estates mortgaged to him in fee, unto his executors, their heirs and assigns, it not being his intention that his heir-at-law should, in any way, be concerned therewith. H. took only a life interest in the 1,000*l.* legacy; and same being a restricted gift, her representatives could not take under it, 174

—— Retainer of, by executor, before accounts taken, 179

—— Annuity to a lady, and after her death in trust for her children, for and towards their maintenance and support until they attain twenty-one, when each is to be entitled to claim a fair proportion of principal. The only child that survives annuitant entitled to whole fund, 179

—— Testator, after giving to each of his brothers and sisters (naming them) living at his death a pecuniary legacy, bequeaths residue of his estate and effects to executors in trust for his wife for her life, and after her decease upon trust to distribute same, in equal shares and proportions (after first paying thereout legacy previously given to each of his brothers and sisters *then living*,) between and amongst each and every of his brothers and sisters, and such of their children as should be *then living*: parents and children to be classed together, and to share in equal proportions. Residuary fund distributable in equal shares *per capita* amongst such only of brothers and sisters of testator and their children as are living at death of testator's widow, who survives testator, 180

—— A testatrix gave to grand-daughter all her property, except certain pecuniary legacies, but should her grand-daughter marry, then her issue to be her heirs; but should her grand-daughter die and not leave any issue, then her property to be divided between other persons. Testatrix concluded her will by observing that "her property was in the Bank and India House." Testatrix's property, on her death, consisted of a sum of East-India stock, and 3½*l.* per cent. Bank annuities. Dividends of those sums to be paid to grand-daughter during her life, and those sums not to be converted, 182

Legacy—Liability of testator's estate to pay future calls on shares bequeathed, 243

—— "I give to my mother, for her natural life, all interest of money arising from money in the hands of A. B, and which money was settled upon me by my aforesaid beloved mother, and at her decease the interest to be given unto my beloved daughter, C. D, for her natural life, and afterwards to devolve in succession upon my remaining dear children." C. D. dies during the lifetime of A. B, and all testatrix's children are infants at her decease. Next eldest child to C. D, in priority of birth, who had attained twenty-one, entitled to interest of fund for his life, 247

—— Bequest of money to arise from conversion of all the residue of personal estate "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain," a good charitable bequest, 270

—— Testator bequeaths 10,000*l.* to his brother, to be paid in twenty equal half-yearly payments, but in case his brother die before all payments become due, then remainder to be placed out at interest, to be paid to children of his brother till they attain twenty-one, and then principal to be divided amongst them. Brother dies after three payments made, leaving five children, one supposed to be dead, not having been heard of for thirty years. Four of children receive their shares, and file a bill praying that remaining share may be divided amongst them. Sufficient evidence of legitimacy of children, and each is entitled, upon attaining twenty-one, to a share in residue, but inquiries directed as to death of child who had not been heard of, 281

—— Testator devises his estates to trustees, and directs them to pay his wife an annuity of 1,800*l.* clear of all taxes and deductions whatsoever. He also directs his trustees to invest 18,000*l.* in the funds, and pay interest to his daughter for life, for her separate use, and afterwards to her children, and directs, that as his daughter will be entitled to 12,000*l.* and upwards under his marriage settlement, said sum of 18,000*l.* is to be abated and reduced to such an amount as she shall receive under such settlement,—it not being his intention that she should be entitled to her portion under settlement as well as to 18,000*l.* Daughter marries, and no settlement is made upon her marriage. Interest of daughter a chose in action in remainder, incapable of being given up *in præsenti*, and election by daughter cannot be decreed against dissent of husband, in suit where husband and wife are co-defendants. Interest upon legacy not payable for first year after testator's death; and widow's annuity not clear of income tax, 305

—— Where testator, by will, gave to A. a legacy of 500*l.*, and by codicil bequeathed a further legacy of 500*l.* to A, which he declared to be in addition to the like sum bequeathed to him by the will, and by a second codicil bequeathed to A. 500*l.* in addition to the 1,500*l.* which he had before bequeathed to A:—Held, that A. was entitled to a legacy of 2,000*l.*, 332

—— Testator, after absolute bequests to three children, bequeaths to his daughter H. 1,000*l.* out of his 3½*l.* reduced stock, and also 70*l.* a-year during her natural life, to be paid to her by four quarterly payments after H. attains age of twenty-one and six months; which two sums he directs to be under trust of his executors, viz., not to permit

H. to assign said annuities to any one, and interest arising from the 1,000*l.* as it became due to be paid to her, for her life, into her own hands, and her receipt to be a sufficient discharge, even if she marries, and at her decease the 1,000*l.* to be equally divided between her children. H. is unmarried and a minor at death of testator, but marries after attaining twenty-one years and six months, and then dies, leaving no issue.—H. took only a life interest in the 1,000*l.* legacy; and same being a restricted gift, her representatives could not take under it, 404

Legacy—Where testator, who died in 1789, gave all his property to defendant upon a series of trusts, which did not exhaust whole beneficial interest in estate, and appointed defendant his executor, executor takes undisposed-of residue for his own benefit, 425

—— Gift of remainder to persons who, at time of the death of testator, answered character of his heirs-at-law, where testator directed trustees to set apart sufficient sum out of his estate to produce 600*l.* per annum, to be paid to his daughter for life, with remainder amongst her children; and if at death of daughter, she should have no child or children living, or they should not live to attain twenty-four years, directed trustees to sell out monies, and pay thereout certain legacies; and bequeathed all the rest and residue of said principal trust monies to and among his heirs-at-law, share and share alike; and testator's daughter died without issue, 427

—— to next-of-kin of a particular surname, where surname changed by marriage, 433

—— A farmer gives a legacy in these words; "to W. R, one of my farming men." At date of will and time of death he has two persons in his service named W. R.—one a farming man, the other employed both in house and farm:—Held, (upon some evidence that testator intended to benefit the latter,) that the latter and not the former was entitled to the legacy, 434

—— Testator directs trustees to sell personal estate, and after payment of debts, &c., to invest residue, and out of produce thereof, or if need be by sale and conversion, from time to time, of a sufficient part of principal, to pay two annuities; and if occasion should be, from time to time, to pay out of rents and profits of freehold and copyhold estates so much of annuities as his said personal trust estate should be insufficient for discharging. Personal estate being exhausted, and annual rents of real estate insufficient to keep down annuities, arrears are to be raised by sale or mortgage, 436

—— Fund to trustees on trust, to pay proceeds of it to A. for life; and, after death of A, to pay principal money unto and equally amongst all and every the children of A. and B, which should be living at death of A, and lawful issue of such of them as be then dead, share and share alike. This a gift to children and issue of A. and B. *per capita*, and not *per stirpes*, 437

—— Unto and to use and benefit of several in-brothers and in-sisters for time being resident in several hospitals of or in vicinity of Canterbury, a yearly sum of 5*l.*, void for uncertainty, 441

—— A testatrix gives 1,000*l.* to her nephew to bring up and maintain her natural son Frederick; she then gives residue of her property for the benefit of her four children, including Frederick. Nephew takes the 1,000*l.* absolutely, 455

—— Testator's widow beneficially entitled to copyhold and leasehold property, to exclusion of next-of-kin of testator, where testator bequeathed copyhold and leasehold property, upon failure of prior trusts and limitations, in trust for his personal and not his real representative; and appointed wife sole executrix of will and residuary legatee, 466

Legacy—Testator gave to three persons annuities of 25*l.* each; and residue of income of his estate, during lives of annuitants, to M. and N, to be paid to them during their lives, in equal shares; and, after deaths of annuitants, as to residue of his estate, the same to M. and N, and their several children to be divided between them in equal shares. One of annuitants died first, then M; and, subsequently, N:—Held, that testator died intestate as to a moiety of income of his estate (subject to annuities) between death of M. and death of N; and also as to whole of income (subject to annuities) between death of N. and death of last annuitant; and on death of last annuitant, residue was divisible between M. and N. and their children *per capita*, 484

—— Error in name and sex of legatee rectified by designation in will and by context, when it can apply to no other person; and parol evidence admitted to raise and remove latent ambiguities. Testator gave copyhold estate to nephew William Bell, for life, and after his decease to trustees, "upon trust for Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of Gillingham, single woman, and who formerly lived in my service, for life, and after her decease for all and every the child and children of the said E. Abbott, as tenants in common." In default of such issue, remainder over. It appeared that there was no such person as Elizabeth Abbott, a natural daughter of Elizabeth Abbott, single woman, but there was John Abbott, a natural son of Elizabeth Abbott, whose reputed father was William Bell, a nephew of the testator. Bequest does not fail for ambiguity, and children of John Abbott, who was dead, entitled, 491

—— Testator gives all his real and personal estate to trustees, upon trust, to sell and pay thereout certain legacies, and makes his brother, also one of his trustees, his residuary legatee; and then gives other legacies. Brother takes both real and personal property after payment of all legacies given by will, 494

—— Specific legacies liable for payment of testator's debts before real estates, where testator directed payment of his debts, in the first place, out of his personal estate, exclusive of leaseholds, and if not sufficient, charged his real estates with payment; and then gave divers specific articles to his son, 514

Limitation—"to executors and administrators," effect of, 121

Limitations, Statute of—Right in equity to recover money lost by fraud of one partner against an innocent partner, where remedy at law lost by reason of statute, 105

—— Petitioner claimed money due from estate of testator on a judgment entered up on bond given in 1793. Suit had been instituted in 1817 against testator's estate, for arrears of annuity due to party who instituted it, and prayed that estate might be administered, and that certain documents, which were in possession of obligee, and upon which he claimed a lien in respect of the money due upon bond, might be produced, and lien, if any, of obligee might be ascertained. Statute of Limitations a bar to any proceedings upon a judgment after twenty years, although such judgment a charge upon personal estate only, and suit of 1817 not in nature of a creditors' suit, and no such acknowledgment of debt due upon judgment as would prevent statute from running, 188

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tion, and of order thereon, must be paid out of lunatic's estate, 456

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Master—Transfer of causes referred to Master Lynch, 296
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Mortgage—Where bill of costs of mortgagees' solicitor forwarded to solicitor of mortgagor upwards of a fortnight before payment by mortgagor, and payment being insisted on made by mortgagor's solicitor before delivery up of deeds by mortgagees' solicitor, no order for taxation, notwithstanding mortgagor's solicitor, at time of payment of bill, stated his general objection to items contained in bill, as being excessive and improper, and also made payment under protest, 170
—— Acquisition of legal estate held not to affect question of priority between incumbrancers, the conveyance being taken under a bankruptcy after notice of the express trust with which it was affected. The allowing mortgagor to have possession of title deeds not of itself fraudulent so as to postpone first mortgagee: and where no fraudulent intent charged, Court declined to direct inquiry, and made usual foreclosure decree, but without costs, 370
—— Motion to enlarge time for payment of mortgage-money after order of foreclosure absolute and inrolled, must be made before Lord Chancellor. Form of the application should be, to discharge order and vacate inrolment, upon payment of the money within the enlarged time. Decree of foreclosure no impediment to granting enlargement of time, where case is made out upon the merits. What a sufficient ground on the merits for enlarging the time, 372
—— Upon motion to restrain mortgagee from selling, order by consent to refer it to Master to take account of what was due to mortgagee for principal, interest, and taxed costs; but reserving costs of suit: mortgagee found entitled to much smaller sum than mentioned in mortgage; and on further directions, mortgagee ordered to transfer mortgage debt, as well as premises, and pay costs of suit. Upon appeal, mortgagor not entitled to transfer of mortgage debt; and after course adopted by the parties upon the making of first order, costs of suit followed ordinary practice, and paid by mortgagor, 404
—— A few weeks after death of mortgagor and before probate of his will mortgagee proceeds to exercise power of sale of reversionary interest: solicitors who acted for family of mortgagor protest against sale as unnecessary and oppressive, and offer to pay principal money, interest, and costs as soon as assignment could be prepared: there was no fraud in the transaction, nor was reversionary interest sold under value. Bill filed by executrix of mortgagor to set aside the sale, dismissed with costs, reversing decision of Court below, 405
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—— Where trust fund, to which two parties were entitled in equal shares, had been improperly sold out, and one of them who was the legal personal representative of testatrix, under whose will the trust was created, filed a bill against defaulting parties and other *cestui que trust*:—Held, upon demurrer, that other *cestui que trust* was properly made a party. Principle in *Perry* v. *Knott* approved, but its application to circumstances of that case impugned, 376

—— Bill, stating numerous transactions between plaintiff and C; and that plaintiff had given him bill of exchange for 1,500*l.*, without consideration, which he had indorsed to N, who held it merely as trustee, and had commenced an action upon it, prayed for an injunction and an account:—Demurrer by N. for want of equity and for multifariousness, overruled, 410

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Pleading—Replication filed without notice thereof to defendant until thirty-five days afterwards, ordered to be taken off file, and plaintiff to pay costs of application for that purpose, 442

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Power—By marriage settlement, 1,000*l.* is charged upon real estates of husband, for such persons as wife shall by deed or will, during her coverture, appoint; and, in default of appointment, for executors, administrators, and assigns of wife's mother, then living. Power of appointment can only be exercised during continuance of coverture; and appointment of 1,000*l.*, after death of husband, void; and the 1,000*l.* forms part of personal estate of wife's mother, by virtue of limitation to her executors, administrators, and assigns, 121

—— Tenant for life under power to charge real estate with any sum not exceeding 2,000*l.* for portions of his younger children, to be paid to them at such times as he shall appoint, may make an unequal division of the 2,000*l.* among his younger children, 145

Power of Sale—Oppressive exercise of. See Mortgage.

Practice—Proceeding in one suit after notice of decree in another not instituted for same purpose. See Costs.

—— As to taking bill *pro confesso*. See Baron and Feme.

—— See Amendment. Costs. Subpœna to hear Judgment.

Principal and Agent—Non-liability of parties acting as agents for receivers of assets for interest of fund which had been placed in banker's hands, where no personal representative properly constituted by the Court by reason of not applying to pay the fund into court, 241

Principal and Surety—Estate of A, having been decided to have been charged by way of surety only for securing payment of mortgage and specialty debts of B, and to be entitled to be recouped sums paid thereout due from B.'s estate, personal representatives of A. not entitled to interest out of estate of B, on sums so paid, 308

Privileged Communications. See Evidence. Interrogatories. Production of Papers. Solicitor.

Probate Duty. See Legacy.

Process—2nd of November 1846 plaintiff served defendant with copy of subpœna, omitting indorsement required by 4th Order of December 1833. 10th of December plaintiff obtained order for leave to enter an appearance for defendant, and served him with copy 30th of December. Motion by defendant 8th of February 1847 for discharge of service and order granted with costs, 173

—— Bill filed after Orders of May 1845 came into operation. Defendant answers bill, and goes abroad. Plaintiff then amends bill, and, under 26th Order of May 1845, serves defendant's solicitor with subpœna. Motion by plaintiff, under 29th Order of May 1845, for leave to enter an appearance for defendant, refused, 181

Production of Papers—Admissibility of affidavit of solicitor for the purpose of shewing a confidential employment in opposition to motion for; and non-admissibility of affidavit in answer to support the motion, 88

Production of Papers—Between S. and Y, where S, having discovered that R. was entitled to an estate in fee simple, subject to existing life estate therein, agreed with R. to take proceedings for recovery of same on condition of S.'s having one moiety thereof conveyed to him; a conveyance was executed by R. of the moiety, and a suit was instituted by S, in R.'s name, in which Y. was employed as solicitor; whilst the suit was in course of prosecution, R. contracted with S. to sell him remaining moiety of the estate; and estate coming into possession, R. suspected conveyance and sale to have been fraudulently contrived between S. and Y, and filed his bill to set them aside, 117

—— See Company. Solicitor.

Publication—After order to enlarge publication, irregularly obtained, one of defendants, with notice of order, but treating it as a nullity, set down cause under 116th Order of May 1845, and served subpœna to hear judgment. On motion by plaintiff cause ordered to be struck out of registrar's book, and subpœna set aside at cost of defendant, 200

Railway—Bill by A. and B. on behalf of themselves and all the other shareholders of company provisionally registered, against provisional directors, charging malfeasance and misapplication of assets, and praying account of costs, &c., properly incurred by defendants, and of application of assets in discharge of liabilities of company, and a division of surplus rateably among the shareholders. Plea in bar by defendant, that B. had assigned for value all his interest to C, allowed, on grounds, first, that B, after sale of his shares, had no interest in relief prayed, namely, the winding up of the concern and division of the surplus; secondly, that, under frame of the suit, he could not ask the relief on ground of right to be indemnified from liabilities of company; and, thirdly, that in suit by some on behalf of all the others, assignor of shares could not adequately represent beneficial interest of assignee, 51

—— Where a tenant for life of lands sold by him, under railway act, to company, presents petition for investment of purchase-money and payment of dividends, usual affidavit that he believes his title to be good, and that he is not aware of any other claims, will not be dispensed with, although petitioner is aged and infirm, and although company may have contracted with him, accepted his title, and consented to prayer of petition, 71

—— Managing body of railway company incorporated by act of parliament not entitled to employ funds of company to guarantee payment of dividend or repayment of capital, to other parties who engage in undertakings which are not part of, or directly connected with, works which are authorized by act of parliament; and that, although a majority of shareholders in company may approve of such application of their funds, and although object may not be against public policy. Where directors of railway company propose to guarantee parties who form joint-stock steam-packet company to run vessels from a port to which the railway would convey passengers, one of shareholders in railway company entitled to sue on behalf of himself and all other shareholders (except directors who were defendants), although some of these shareholders have taken shares in steam-packet company. Although plaintiff who files bill on behalf of himself and other shareholders in railway company may be suing at instigation of another rival company, that is not sufficient to prevent him from obtaining special injunction on merits of his case, 73

Railway—Demurrer for want of equity and want of parties overruled, to bill by shareholders against provisional committee for account of expenses, and praying declaration that plaintiffs and other shareholders should be liable only to proportion of expenses properly incurred, and defendants might pay other expenses, and that funds in court might be paid to plaintiffs and other shareholders, 100

—— Bill, by individual members of a railway company, impugning title of a corporate officer to exercise corporate functions, and seeking to take corporate seal and property out of his hands, not sustainable. *Semble*—Proper course is at law by *quo warranto* or *mandamus*. To bill, by four shareholders in a railway company against directors and against company, alleging that twelve out of the eighteen directors ought, at a certain time prescribed by acts of parliament, to have ballotted out one-third of their number and to have elected new directors in their stead, and alleging that, by their refusal or failure so to do, the twelve recusant directors were all rendered incompetent to act, and ceased to be directors *de facto*, and praying for injunction to restrain them from voting or acting any longer as directors, and for transfer of the corporation seal and funds to six lawful directors, general demurrer by company for want of equity allowed by Lord Chancellor, reversing decision of Vice Chancellor of England. Where a common object, and interests of all are identical, a bill may be sustained by individual shareholders of company, on behalf of themselves and all other shareholders. *Taylor* v. *Salmon* and *Wallworth* v. *Holt* commented on. Individual shareholders cannot sustain a bill in their own names alone respecting a matter common to all. If injury complained of personal to themselves, *contrâ*. Principles laid down in *Foss* v. *Harbottle* approved, 217

—— Who to pay future calls where railway shares bequeathed, 243

—— Invalidity of second notice requiring less quantity of land than the first, 282

—— Bill by a few shareholders in railway company, on behalf of themselves and the other shareholders, against provisional committee, stated (among other things) that undertaking had been abandoned, and also various acts of improper conduct of defendants, and that sum of money had been paid into court in respect of undertaking, and that majority at meeting of shareholders had decided in favour of proceeding with the scheme. Bill prayed that account might be taken of all expenses incurred in prosecution of undertaking, and that plaintiffs and other shareholders might be declared to be liable only to a proportion of expenses properly incurred, and that defendants might pay all other expenses, and funds in court might be paid out to plaintiffs and other shareholders. Demurrer for want of equity and for want of parties, on ground that parties who formed majority at meeting, and also other persons who had signed parliamentary contract without taking any shares, ought to be before the Court, overruled, 302

—— A railway company proceeding under sect. 85. of the Lands Clauses Consolidation Act need not give notice to the owner of land sought to be affected: it is sufficient that the proceedings are approved of by two Justices, 335

—— No grounds for motion by owners of land for injunction against Great Northern Railway Company, who had entered upon land required for purposes of railway, under 85th section of Lands Clauses Consolidation Act, first, that operations of company would greatly alter appearance of ground; secondly, that owners had been induced by company to let

the line when mandamus might have been obtained for summoning a jury before long vacation, expire; thirdly, that surveyor appointed under 85th section had been previously in employment of company, and, in that character, had valued the land; fourthly, that sureties named in bond were solicitors to company, and, in that character, were liable to pay very large sums of money in respect of similar bonds; and, fifthly, that sureties were named by company *ex parte*, and without any communication with or reference to plaintiffs. Where owners of land entitled to it as tenants in common, and throughout act together by one solicitor, and are all plaintiffs in the suit, and condition of bond that "if the company should on demand pay to the plaintiffs," jointly, &c., bond is irregular in respect of making money payable to plaintiffs jointly. *Semble*—that introduction of words "on demand" render bond irregular. *Semble*—that suit is irregular from owners of the land being joined together as plaintiffs in suit, 437

Railway—Bond by railway company under Lands Clauses Consolidation Act, conditioned to be void if they should "on demand" pay to plaintiff," or should "on demand" deposit in Bank of England, the amount of purchase-money, not in accordance with directions of act; and company restrained from taking land until they had given bond in conformity with provisions of act, 444

—— A majority of shareholders in Exeter and Crediton Railway Company pass a resolution in favour of leasing their railway to the Taw Vale Company, worked upon the narrow-gauge principle. A majority (seven) of directors of the Exeter and Crediton Company, being desirous of leasing the line to the Bristol and Exeter Company, upon the broad-gauge principle, refuse to carry out wishes of company, and retain possession of common seal. Minority of directors (three) concur with shareholders, file bill in name of company for injunction against seven directors, to restrain them from leasing railway to Bristol and Exeter Company, and from opening line upon broad gauge. Injunction granted. Subsequently, seven directors move in name of company, that bill be taken off file. Vice Chancellor directs motion to stand over until wishes of shareholders should be distinctly ascertained at a general meeting; and Lord Chancellor, upon appeal, confirmed this decision. On motion before Vice Chancellor to dissolve injunction, on ground that majority against opening of railway upon broad-gauge principle had been obtained by improper sale of shares to South-Western Railway Company,—Held, that Court could not interfere to prevent shareholders from disposing of their interest in any legal manner, although such transfer of interest might entirely change original intention and prospects of company; and that injunction must consequently be continued to restrain any acts of directors which should be inconsistent with the wishes of the majority of shareholders, 449

—— The Whitehaven Railway Act provided, that powers of company for compulsory purchase or taking of lands should not be exercised after expiration of three years from passing of act, which period expired 4th of July. Company having given plaintiff notice that they would take a portion of his land under compulsory powers, jury was summoned according to provisions of act, and assembled on 3rd of July, but did not terminate their sittings or make their award till 6th of July. Upon application that company might be restrained from paying money in manner directed by act, and from proceeding to take possession of land, Court granted an injunction until opinion of court of law should be obtained whether compulsory powers had or had not determined, 471

Railway. See Company.

Receiver—Direction not imperative, and trustees not bound to employ plaintiff as manager and receiver, where testator directed that, as his estate would require more management than his trustees could bestow upon it. his wish and desire was that plaintiff should be appointed the manager and receiver, 63

—— Recognizance of, not ordered to be put in suit against surety, where it does not appear from Master's report that a definite sum is due. Where no actual balance found due from receiver, decree of account against administratrix refused, 248

Reference—Effect of, in staying proceedings, 483

Repairs—Court no authority, under 1 Will. 4. c. 47, to direct money to be raised by mortgage of testator's real estate for putting such estate into repair, 280

Replication—Notice of, 442

Reports—Fees for, 295

Revivor—Where bill of, not necessary, 97

Right to Begin. See Master's Report.

Sale. See Mortgage of Ships.

Separate Estate. See Baron and Feme.

Settlement—Who may present petition for, 47

—— A, by settlement, declared that trustees should be possessed of 4,000*l.*, as to moiety for M. and her children; and, as to other moiety, for N. and her children; and that if both M. and N. should die without issue living at time or respective times of their decease, *then* that trustees should divide trust monies among personal representatives of A. in a legal course of administration. M. and N. both die without having been married. A. leaves no widow. Persons intended to be benefited the next-of-kin of A. living at his death, 169

—— By settlement 14th of February 1842, trustees directed to stand possessed of a sum of stock on trust for settlor for life, and, after his decease, on trust, to pay dividends to B. for his life, or until he should become bankrupt; and, on his becoming bankrupt, then to pay dividends to wife of B. for life, for her separate use. On 7th of February 1842 (seven days before date of the settlement) fiat in bankruptcy issued against B, who obtained his certificate in December 1842. Settlor died in 1845. To exclusion of assignee of B, B.'s wife entitled to dividends for her separate use for her life, 245

—— By marriage settlement, funds were vested in trustees by intended husband, in trust for himself for life, with remainder to intended wife for life, remainder to children of marriage, and, if no children, then in trust for such persons as settlor should appoint, and in default of appointment, "in trust for next-of-kin or personal representatives of settlor, in due course of administration, according to Statute of Distribution." Marriage took effect, but there were no children, and settlor died before his wife, having by will disposed of his general personal estate, residue of which he bequeathed to certain charities. Property of wife was settled exactly in the same manner as that of husband, with a like ultimate limitation to her next-of-kin. On death of wife, her personal representative claimed her share as widow in fund settled by husband, in opposition to claims of the representative of her next-of-kin at his death, and also to residuary legatees. Next-of-kin entitled to fund under settlement, to exclusion of widow; fund does not pass by will, and charities not entitled, 503

—— See Parties. Power.

Ship and Shipping—On bill filed to set aside bottomry bond, given at Trieste, without any communication from captain to owners in England, and, as

alleged, by a fraudulent conspiracy between captain and obligee, Court supported bottomry bond, but, instead of dismissing bill, at the request of defendant (the obligee) directed inquiries as to amount due to him upon bond, 429

Ship and Shipping. See Mortgage of Ships.

Solicitor—Under 37th section of 6 & 7 Vict. c. 73, bill of costs delivered, though not signed by solicitor, or inclosed in a letter signed by him referring to it, may be referred by Court for taxation. Client obtains an order of course, to tax solicitor's bill of costs delivered to him, and therein solicitor is directed to deliver up all papers, &c. belonging to client on payment of amount found due. Solicitor has other papers, relating to business transacted for a deceased person, now represented by petitioner, and in respect of which he claims a lien for other costs. Court, under the circumstances adduced, decline to discharge order for irregularity, 25

—— Negligence of, no ground for granting further time to amend, 69

—— Liability of innocent partner for fraud of his copartner, 105, 495

—— Where person whose name was affixed to bill as plaintiff's solicitor not a solicitor of court, order directing that name of a solicitor should be substituted, and that registrar should satisfy himself that proposed person was a solicitor, and also directing all further proceedings against defendants should be stayed, plaintiff not being present at the application for latter part of order, or having had notice of it, discharged for irregularity, 144

—— Bill referred for taxation on petition of B. and C, where solicitor had been employed by A, B, and C, carrying on business together, and had also transacted business for A, separately, and he afterwards sued the three at law for amount of bill of costs, in respect of business transacted by him for three, as well as for one only; and appeared in action for A, as his solicitor, and entered up judgment in action against him, 163

—— Mere protest against bill of costs, and impropriety of items contained therein at time of payment, will not entitle party making payment to an order to tax bill. Mortgagor, seeking to tax bill of mortgagees' solicitor relative to mortgage transactions, only allowed to tax bill in same manner, and on same principle as mortgagee, 170

—— G, a solicitor, a trustee under settlement, in which M. and H. were respectively interested, ordered, on bill filed by M. against H. and G. to produce letters admitted by G.'s answer to be in his possession, and written by him whilst acting as H.'s solicitor, during negotiations touching settlement, and subsequently to execution thereof; notwithstanding allegation of G, that most of the letters were written by him, and signed with name of himself and partner in business, as solicitor to H, and that they were not written by him as trustee under settlement, 171

—— Petition, seeking taxation of bill of costs, after payment, must point out and particularize items of overcharge. Payment of bill *primâ facie* admission of correctness; and, after payment, special circumstances must be shewn to entitle party to order for taxation of bill. Special circumstances usually relied on when pressure exercised by solicitor, and immediate payment required, where delay in completing business would be inconvenient to party paying; and error or overcharge in bill. Errors or overcharges may amount to evidence of fraud, in which case only very slight circumstances of pressure are necessary, if necessary at all. Client may pay his solicitor a bill of costs, without ever having seen or had delivered to him any bill; but such a course bad conduct in solicitor, and imprudent in client. Petition containing unfounded charge of fraud, dismissed with costs, 288

Solicitor—Under order for taxation of solicitor's bill, solicitor to refund anything certified to have been overpaid. Master not authorised to take general account of all transactions between the parties; but ought to take into account all monies received by solicitor in that character, applicable by him to payment of his bill, 417

—— See Annuity.

Solicitor and Client — Privileged communications, 153, 171

Specific Performance—Unexplained delay of vendors from 17th of January 1842 to 30th of August 1843, held to preclude them from the assistance of court of equity in enforcing performance of contract, especially in a case where time was material. Reference as to whether good title had been shewn on the 17th of January 1842 refused, and bill dismissed with costs. Purchaser, after notice of rescinding, having allowed deposit to remain in hands of vendor without taking any steps to enforce repayment, no excuse for the vendor's laches in not enforcing contract. *Quære*—Whether the Court could, by decree in the cause, order repayment by plaintiff of deposit. Continuance, under protest, of correspondence on title after notice of rescinding contract, gives it the character of a treaty for renewal of rescinded contract, and not of the continuation of subsisting contract, 378

—— See Vendor and Purchaser.

Statute—9 & 10 Will. 3. c. 15, 90

—— 9 Geo. 2. c. 36. s. 3, 285

—— 1 Will. 4. c. 47, 280

—— 1 Will. 4. c. 60, 72, 416, 456, 498

—— 1 Will. 4. c. 60. s. 10, 187

—— 3 & 4 Will. 4. c. 27, 188

—— 7 Will. 4. & 1 Vict. c. 26. ss. 33, 34, 111

—— 3 & 4 Vict. c. 26, 327

—— 3 & 4 Vict. c. 113, 313

—— 5 & 6 Vict. c. 45, 140

—— 6 & 7 Vict. c. 73, 25

—— 6 & 7 Vict. c. 85, 246

—— 8 Vict. c. 18. s. 85, 438, 444

—— Construction of railway acts as to investment of purchase-money, 71

—— Question whether an act be public or private to be resolved not by any formal considerations, *ex. gr.* whether there be a clause declaring it shall be deemed a public act, but by the substance and nature of the case. Where an act is limited in its operations to a particular place, and is expressed to be for the interest of a particular class of individuals, and the parties interested are empowered in general terms to do certain acts, Court will not construe this a power to interfere with rights of strangers to act, unless intention of act to affect such rights can be collected from express words or by necessary implication, 274

—— See Railway.

Statute of Frauds—In 1843 plaintiff and A. agreed by parol to become jointly concerned in speculation for buying, improving, and selling land: land was purchased by the plaintiff according to the contract, and A. afterwards made over a moiety of his interest to C: the purchase-money was provided by A. and C, and the conveyance taken in their joint names: agreement, dated 27th of October 1843, between A. and C, to the effect that A. and C. were interested in two-thirds of the surplus profits, and that the remaining one-third was to be reserved for the plaintiff; but that the plaintiff should have no power to determine when any re-sale should take place: in 1844 A. died, having devised the property

by will: to bill by plaintiff against C. and devisees of A. for account, sale of land, and application of proceeds, all the defendants insisted, by answer, on the Statute of Frauds, C. admitting that previously to his joining in the speculation, A. had informed him that the plaintiff was to have one-third of the surplus profits:—Held, a partnership; and that the partnership being established by general evidence, the land would be dealt with in equity as the stock of the partnership; and statute no bar to plaintiff's claim. Memorandum of October 1843, coupled with previous assertions in writing of plaintiff's right, which was never denied by A, a sufficient manifestation in writing, within the statute, of pre-existing interest of plaintiff in lands. Court declared plaintiff entitled to one-third, and referred it to Master to inquire as to expediency of immediate sale, 397

Staying Proceedings—Order for, in absence of party, irregular, 144

—— Reference to Master to inquire which of two suits is most for benefit of infants has not effect of course of staying proceedings in both suits during reference, 483

Subpœna—Where defendant abroad, order refused for substituted service of subpœna to appear and answer, upon a gentleman, who was not shewn to have any authority to act for him in the matter of the present suit, but who had acted for him as attorney in an action wherein a judgment was obtained, upon which the suit was founded, and had been since in communication with him upon the same matters, 369

Subpœna to hear Judgment—Where defendant becomes bankrupt after answer, and his assignees are before the Court, the bankrupt need not be served with a subpœna to hear judgment, 368

Suicide. See Insurance.

Survivor. See Will.

Survivorship. See Baron and Feme.

Taxation. See Solicitor and Client.

Tenant for Life. See Waste.

Time. See Vendor and Purchaser. Waste.

Title Deeds. See Mortgage.

Traversing Note—Plaintiff served some defendants residing out of jurisdiction under 4 & 5 Will. 4. c. 82, and entered an appearance for them, and filed traversing note under 52nd Order of May 1845. Motion under 56th Order of May 1845, that copy of the traversing note might be served on them, refused, 152

—— Time for filing, 182

Trust—Where direction in will to appoint receiver not imperative, 63

—— Petition presented under 1 Will. 4. c. 60. s. 22, for appointment of new trustees of trust property, in which adults and infants are interested, ought to be served on infants as well as on adults, 72

—— As to the erroneous appointment of new trustees by decree of Court, and assumption by Court of discretionary power given to trustees by testator to invest residuary personal estate in purchase of lands in England and Scotland, to uses declared in deed of tailzie and in English will, 81

—— On bill for specific performance of agreement entered into by testator to grant a lease to plaintiff for twenty-one years, with covenant for renewal for two further successive terms of twenty-one years each, devisee in trust, with no beneficial interest, cannot be compelled to enter into any covenant for renewal of lease, nor any other than usual trustee's covenant, that he has done no act to encumber, 102

—— Court will not make order under Trustee Act, 1 Will. 4. c. 60, for transfer of stock standing in name of a deceased trustee whose next-of-kin refuses to administer, 187

Trust—Where interest in income is given to a person subject to discretion of another, Court will not deprive trustee of exercise of that discretion so long as it is fairly exercised, 259

—— Testator bequeaths legacies to certain parties for life, with remainders over, and directs the sums to be invested in names of two persons as trustees: survivor of those trustees dies, having bequeathed all property held by him in trust to A.—A. not a trustee under will of original testator, and new trustees appointed, 416

—— Where settlement contains power to appoint new trustees in certain cases, but power does not apply to circumstances which have taken place, Court may appoint new trustees under 1 Will. 4. c. 60, 493

—— Where bill charges trustee with having fraudulently let trust property at an undervalue, to obtain personal benefit to himself, but allegation of fraud is altogether disproved, Court will not inquire whether a higher rent might not have been obtained, so as to charge trustee for neglect or omission. Where trustee has let trust property at a proper rent, but it afterwards appears probable that either from outlay of tenant, or rise of agricultural produce, higher rent may be obtained, trustee will not necessarily be charged with difference between such higher rent and that which is actually received, although he does not immediately raise rent, 499

—— A. B, executor of his father's will, sold out stock, and employed it in his business; but afterwards replaced it in full. C. D, his sister, entitled to a life interest in part of the stock, with remainder to such of her children as should be living at her decease. On death of A. B, E. F, a son of C. D, threatened to take proceedings against representatives of A. B, to make his estate liable for breach of trust in so using stock, whereupon C. D, who by her will had given certain benefits to E. F, made a codicil thereto, and thereby declared her full approbation of A. B.'s conduct as regarded the trusts of his father's will, and prohibited every person entitled to any benefit under her will from setting up any claim on account of any error or irregularity in execution of those trusts; and authorized her executors and trustees to give and receive such releases and discharges as might be proper for effecting the objects of such declaration and prohibition. On death of C. D, E. F. received legacy given him by his mother, and signed ordinary legacy receipt for it, but did not give a release, and afterwards instituted the threatened suit:—Held, that having accepted the gift under his mother's will, he was only entitled to have common account, but not to make any claim against estate of A. B. in respect of employment of his testator's assets in his trade; and so much of bill as sought to establish that claim was dismissed with costs, 509

—— See Company. Jurisdiction. Settlement. Will.

Vendor and Purchaser—In suit by A. as vendor against B, for specific performance of a contract of sale of leasehold property, B, by his answer, states that sale was made by auction, and insists that A. is not entitled to a decree, on the ground that he employed puffers. At hearing of the cause, it is decided that case set up by B. is not a valid defence to suit, and usual reference made to Master. In Master's office, objection made by B. to title, is at once removed by A. Master finds that A. has made a good title to property, but had first shewn a good title in the Master's office. On the cause coming on for further directions (on the ground that B. ought to have ended all litigation after the first decree),—Held, that B. ought to pay all costs of suit after first decree, 16

Vendor and Purchaser—Assignees of C, an insolvent, with consent of C.'s creditors, agree with M, that he shall pay 35,000*l.* for purchase of estate of C, and that assignees shall cause sale to take place by public auction, without any reserved bidding, except proposed bidding of 35,000*l.*, and that if M, at such sale, bid 35,000*l.*, or any higher sum, and there being no higher bidding than his, estate shall be knocked down to him at such bidding of 35,000*l.*; but M. is not bound to make any higher bidding. Particulars and conditions of sale are duly printed and circulated, stating that the estate is to be sold without reserve. M.'s agent attends sale, and also W, agent of F, and many other persons. Estate is knocked down to F. at 50,000*l.*, who, through his agent, pays deposit of 5,000*l.*, and signs usual undertaking to complete his contract; the immediately preceding bidding being made by M. F, at time of sale, knew that M. would bid 35,000*l.* for C.'s estate; but it did not appear that F. was acquainted with the agreement between M. and C.'s assignees:—Bill, by assignees of C, seeking specific performance of contract, cannot be sustained; and dismissed with costs; but F, by his answer, having repudiated agency of W, who attended sale, and bid on F.'s behalf, ordered to pay costs incident to making of W. a party to suit, 17

—— After answer to bill by vendor, for specific performance, reference as to title directed upon motion, notwithstanding answer stated that time for completing contract had long since expired, and that vendor had not complied with requisitions on abstract, and that purchaser had given notice of rescinding the contract. Where dispute is as to application of conditions of sale, and propriety of conditions is undisputed, question is one of title, and not of contract. Where time is not originally of the essence of the contract, purchaser cannot rescind contract without notice, or before expiration of his notice, on ground of delay of vendor in complying with his requisitions of title, 21

—— Purchaser bound to pay costs of his attendance before Master, where, under decree in creditors' suit, ordering that real estates of debtor should be sold, and that Master should settle conveyances in case parties should differ, application is made to Master respecting a conveyance, 56

—— Purchaser ought to pay purchase-money and interest into court, without any deduction from interest in respect of income tax, 174

—— Motion with consent of all parties, that purchaser might pay his purchase-money into court without accepting title, refused, 178

—— Purchaser, not in a situation to comply with conditions of sale, obtains an order *nisi* to confirm Master's report, finding him the purchaser of estates sold by order of Court, but having delayed to confirm report absolutely, plaintiffs move, on notice to purchaser, to confirm same absolutely. Motion being of course, and not requiring notice, application refused with costs, 215

—— Plaintiff entitled to equitable life interest in leasehold property, under will, assigns same to defendant, in consideration of an annuity to be secured by the covenant of purchaser; and by same deed purchaser covenants for himself, his heirs, executors, and administrators, to pay annuity, to insure and repair premises and observe the covenants in the lease, and to indemnify plaintiff in respect thereof. Plaintiff has a lien upon premises for annuity; and arrears of annuity and costs of plaintiff suing *in forma pauperis* directed to be paid out of rents of premises, 239

—— Under decree made in administration suit, the bill not praying a sale of the testator's real estate, Master made his report, finding a small balance of personal estate in the executor's hands, not sufficient to pay the costs of the suit. By a decretal order on the report, sale was directed of the real estate, under which A. became purchaser, and was found to be such by Master's subsequent report, afterwards confirmed by order of Court, and leave was at the same time given to A. to pay the purchase-money into court. Order served on all necessary parties and passed, and the purchase-money paid into court. One of the defendants was a minor at the date of the original decree. Petition by A, praying discharge of that order, insisting that the Court had no power to make that order for sale of the real estate, or if it had, such power had not been properly exercised, dismissed, without costs, 333

Vendor and Purchaser—Assignees of C, an insolvent, with consent of C.'s creditors, enter into agreement with M, that he shall pay 35,000*l.* for purchase of estate of C, and that assignees shall cause sale to take place by public auction, without any reserved bidding, except proposed bidding of 35,000*l.*, and that if M, at such sale, bid 35,000*l.*, or any higher sum, and there being no higher bidding than his, estate shall be knocked down to him at such bidding of 35,000*l.*; but M. is not bound to make any higher bidding: particulars and conditions of sale are duly printed and circulated, stating that the estate is to be sold without reserve; M.'s agent attends sale, and also W, agent of F, and many other persons: estate is knocked down to F. at 50,000*l.*, who, through his agent, pays deposit of 5,000*l.*, and signs usual undertaking to complete his contract; the immediately preceding bidding being made by M. F, at time of sale, knew that M. would bid 35,000*l.* for C.'s estate; but it did not appear that F. was acquainted with the agreement between M. and C.'s assignees:—Bill. by assignees of C, seeking specific performance of contract, not sustained; and dismissed with costs, 401

—— Bill filed to obtain re-assignment of leasehold tenements, assigned to a purchaser for residue of term of years to be computed from specified time, where it was afterwards discovered that term did not commence till several years later, and that lease would exist for twelve years longer than had been supposed, vendors not entitled to any relief, 454

—— See Specific Performance.

Ward of Court—Contingent interest of lady entitled to property upon attaining twenty-one or marriage, and marrying under age, sufficient to entitle her to be made a ward of court; and her mother, although in the light of a stranger to property, may petition to have a settlement under a decree of the Court, 47

Waste—Under marriage settlement of late Duke of L., made in 1797, family estates, including Kiveton Hall, were settled upon late duke for life, without impeachment of waste, with remainder to his eldest son in tail male. In 1809, late duke pulled down mansion-house of Kiveton Hall, cut ornamental timber and other trees, destroyed gardens, and converted estate into a farm. Plaintiff, his only son, attained twenty-one in 1819, and joined with his father in suffering a recovery of the estates, but did not at that time make any claim for compensation in respect of waste committed. Plaintiff married in 1823, contrary to his father's wishes, and differences arose between them. Late duke died in 1838, upon which plaintiff filed his bill against trustees and devisees of his father's will, claiming compensation for these acts of waste. Acts complained of amount to equitable waste, and plaintiff fully justified in waiting till death of the tenant for life before he filed his bill for compensation; length of time no bar, and estate of late duke liable to account for all the profit received from those acts, 5

—— Wife's estate by marriage vested in husband, and he alone responsible for waste, where estate

given to a lady for life, with direction not to commit waste, she marries, and acts of waste are committed by her husband, and upon her death bill is filed for an account of waste and dilapidations. Legal personal representatives of the wife not necessary parties to the suit, 49

Waste—Tenant for life, without impeachment of waste, pulled down mansion-house and rebuilt it in a more eligible situation; this act not complained of by remainder-man, but injunction granted to restrain tenant for life from destroying timber which had formed an ornament and shelter to the original mansion, 201

Will—E, by his will, first directs payment of debts out of personal estate. Will then contains gift of E.'s real and personal estate to trustees, upon trust, to convert same, and apply proceeds, first, in satisfaction of expenses of sale, and then in payment of debts and legacies to individuals and charitable institutions, and for other general purposes mentioned in will;—sometimes treating his estate as real and personal estate, and at other times as personal estate: —Held, no conversion out and out; and that so much of fund as arose from real estate resulted to heir-at-law, and so much as was derived from chattels real resulted to next-of-kin of testator; and that only such part of testator's estate as consisted of pure personalty could be applied in satisfaction of the charity legacies. It does not follow, because testator at the commencement of will has directed payment of his debts out of personal estate, that he intended to controul a subsequent direction to his executors to pay them out of a common fund of a mixed character, 59

—— Construction of, as to recommendation to appoint manager and receiver, 63

—— Testator devises and bequeaths residue of estate and effects, consisting of freehold and personal property, to trustees, upon trust, to call in all accounts due to him, and in case there shall not be sufficient to satisfy annuity thereafter given to his wife, then upon trust to sell all his real and personal estate, and out of income of produce thereof, and rents of his real estates until the same should be sold, to pay his wife an annuity of 300*l.* per annum. Rents of the estates not sufficient to satisfy annuity, but no part of real property is sold till after death of widow, at which period a considerable sum is due for arrears of annuity:—Held, that trust for sale arose immediately upon its being ascertained that rents were not sufficient for annuity; that, consequently, there was a direction for conversion of real estate, and residue must bear the character of personal property, 66

—— Questions under will and deed of tailzie as to appointment of new trustees, and investment of residuary personal estate, 81

—— Revocation of, by an incomplete testamentary paper, 116

—— Testator directed that all his property should be at disposal of his wife for herself and her children. Wife and children take interests as joint-tenants in possession, 214

—— Testator devises all his real estate to trustees in trust to sell; and directs them to stand possessed of purchase-monies, in first place, to pay all debts due from him at his decease, and then to retain all costs, charges, and expenses attending execution of trusts, and then to pay legacy of 500*l.* to daughter of his heir-at-law, and to invest 500*l.* for the benefit of C. for life, and after her decease for D. And as to all his ready money and securities for money, and all other his personal estate, he gives the same to D. Trustees to be allowed to retain to themselves all charges and expenses they may be put unto in the execution of his will, or in relation thereto; and to be his executors. No legacy to his heir. First, produce of real estate, after paying charges which ought to be imposed on it, undisposed of, and goes to heir. Secondly, testator's debts not thrown on real estate, in exoneration of personal estate, 251

Will—Testator directs that wife shall receive all rents and profits of his real and personal estate, and pay and apply same to and for the use of his said wife and children of their marriage, agreeable and according to her own discretion, during her life. Plaintiff, one of the children, on bill against widow, praying that a proper proportion of income may be secured for plaintiff's benefit, has an interest, but only entitled at hearing to account of income of testator's estate and of application of such income, in order to enable Court to judge whether discretion has been fairly exercised, 259

—— Testator bequeathed residuary estate to trustees upon trust for A, with proviso if A. died without having attained twenty-one, and without leaving lawful issue him surviving, then that the trustees should pay the money arising from his estate unto and equally among B, the children of C. and the children of D, and the issue of such of them as should die leaving lawful issue, such issue taking their parent's share. A. died under twenty-one, and without having been married. B. was the first of the residuary legatees who attained twenty-one. C. had children living at the death of the testator, and born afterwards.—The children of C. born between the death of testator and B.'s attaining twenty-one, held entitled to share in the bequest, 344

—— Testatrix, by will, gave her real and personal estate to trustees, upon trust, as to the personal estate to invest in government or real securities, and to pay the rents, &c. of her said real and personal estate to her mother for life, remainder to her sister L.B. for life, and from and after the decease of the survivor of them, upon trust, to sell her real estate, and the money arising therefrom, together with all rents and profits from the last payment made to the survivor, to be paid by the trustees, after deducting all costs, &c., unto such person or persons as she should by any codicil bequeath the same; but in case she should not by any codicil bequeath the same monies, she directed that the same should be paid by her said trustees unto and amongst her next-of-kin, in due course of administration as the law directed in respect of the intestate's personal estates. By codicil she revoked the bequest after the life estate, and directed that the "said residue" should be paid to her next-of-kin on the part of her said mother only, and not to any of her next-of-kin on the part of her then late deceased father. At the death of the testatrix, L. B. was her sole next-of-kin both *ex parte paternâ* and *ex parte maternâ*: —Held, that the next-of-kin *ex parte maternâ* of the testatrix living at the death of L. B. (excluding L. B.) were entitled to the residue of the proceeds of the real estate; and that the residue of the personal estate, subject to the life interest therein given, was undisposed of by the will and codicil, 361

—— Issue *devisavit vel non* directed, where testator, after giving benefits under will to his daughter, his heiress-at-law directed, that if his daughter, or any person in her name, should dispute the will, or refuse to confirm it when required to do so, disposition in her favour should be forfeited; commission of lunacy had been issued against testator, and had not been superseded at date of his will; testator's daughter and her husband refused to confirm the will; bill was filed to establish it, and a trial was directed to ascertain whether daughter had forfeited the benefits conferred upon her; Court of law decided that they were forfeited; and bill was filed by trustee of daughter's marriage settlement, which contained a clause that any property to which she might

become entitled should be settled upon her and her children; by which bill second trial was asked for; and evidence was produced that testator was of sound mind at time of making his will, 487

Will. See Assets. Power.

Witness—Under 103rd and 104th Orders of 1845 additional interrogatories may be exhibited before commissioner for examination of witnesses, during sitting of commission, as circumstances may require; and it is not necessary to obtain an order of Court for that purpose, 48

—— Examination by plaintiff of co-partner, defendant in suit for contribution, 238

—— Where a suit had become defective by insolvency of sole plaintiff, who had obtained a protecting order under 7 & 8 Vict. c. 96, and his assignees adopted the suit and filed a supplemental bill, and an answer put in, not disputing the insolvency, and replication filed, and issue joined,—motion by assignees for leave to examine the insolvent plaintiff in the original suit as a witness in the cause, refused, 320

Witness—In a suit against a guardian of a parish to establish certain defalcations in the accounts, a person who was one of the guardians at the commencement of the suit, but had ceased to be guardian, has no further interest in the suit than as a rate-payer, and may become a witness under the 3 & 4 Vict. c. 26, 327

—— An order for leave to examine a co-defendant as a witness may be obtained *ex parte* as well after as before decree; and the question, whether the proposed witness is or is not interested can only be raised upon objections to the reception of the evidence, 336

—— See Evidence.

BANKRUPTCY.

Annulling Fiat. See Fiat.

Assignees—Fiat issued against bankrupt on his own petition: at meeting of creditors for choice of assignees, A. tendered proof of a debt, which Commissioners adjourned. Choice of assignees proceeded with: the solicitor who had been concerned for bankrupt represented all the other creditors at this meeting: A. was afterwards admitted to prove for whole of his debt. On petition of A, choice of assignees set aside, 9

—— See Official Assignee.

Committal—A bankrupt, who was examined before a London Commissioner, not having satisfactorily answered questions put to him, was committed to the custody of a messenger of this court; was afterwards brought before a subdivision Court, by which, after another examination, he was committed to Newgate; and afterwards was brought up before the Commissioner in whose jurisdiction the fiat was, and after examination re-committed to Newgate on the old warrant,—Held, entitled to his discharge, on the ground that a record ought to have been made of his last examination. *Quære*—Whether a warrant by the subdivision Court, which is a commitment "until such time as he shall submit himself to us, or to any of the Commissioners of the Court of Bankruptcy, and answer make to the questions put to him by us," is legal, 6

Company. See Fiat.

Contempt—A, while attending Court of Bankruptcy on petition of his own, was taken into custody for contempt, for not paying costs he had been ordered to pay by decree made in a cause in which he was defendant. An application for his discharge to Vice Chancellor, in whose department the cause was, on the ground of privilege, refused, 14

Costs—The expression in the 8 & 9 Vict. c. 127. s. 3, "costs remaining due at the time of the order of imprisonment being made," means the costs to be paid by instalments mentioned in the order for payment; and the expression "all subsequent costs," in that section, means costs incurred by reason of debtor's default in payment of the instalments, 5

—— See Official Assignee.

Delay—in presenting petition to annul fiat. See Fiat.

Discharge. See Committal.

Election — Creditor, who had proved his debt and joined other creditors in opposing certificate, restrained from suing bankrupt in small debts court, 9

Examination. See Committal.

Fiat—Where a fiat issued on the 19th of September; and on the 9th of October a choice of assignees; and the 14th of December was the day appointed for granting the bankrupt his certificate; and on the 12th of December the petitioner gave notice of an intention to petition to annul the fiat, which was presented on the 14th of December,—petitioner not precluded from being heard, on ground of delay, 3

Fiat—By deed of settlement of a company twelve persons were the committee of management; and it declared that the majority of members of committee for time being present as members of such committee, consisting of not less than five persons, should have power to bind the company: a meeting of committee was summoned, at which three members only attended, and a resolution was passed that the company was unable to meet its engagements: a declaration and minute were filed as required by 7 & 8 Vict. c. 111; and a fiat issued against the company. Petition to annul fiat, presented by two other members of the committee, not heard without serving other members of the committee who dissented from the views taken by the petitioners; and resolution passed not a resolution "duly passed," within meaning of 7 & 8 Vict. c. 111, and fiat ought to be annulled, 11

Official Assignee—Duty of, to examine the lists of creditors prepared by solicitors to fiat, before he signs them; and he is liable for consequences of omission of any creditors from the lists, 10

—— entitled to costs of separate appearance at hearing of petition for the sale of property mortgaged by bankrupt to the petitioner, who employed the solicitor who acted for the creditors' assignees, 13

Parol Agreement. See Proof.

Partners. See Proof.

Privilege from Arrest. See Contempt.

Proof—Where B, a trader, being indebted to A, entered into partnership with C; and afterwards by parol agreement between A, B, and C, the debt due from B. to A. was converted into a debt to be due to A. from B. and C. as partners, and some time after B. and C. were made bankrupts,—A. had a right of proof against the joint estate of B. and C. in respect of the debt, 4

Proof of Debts. See Election. Official Assignee.

Statutes—5 & 6 Vict. c. 122. s. 10. Construction of term "cowkeeper," 3

—— 7 & 8 Vict. c. 111, 11

—— 8 & 9 Vict. c. 127. s. 3, 5

Trading—A person who farmed 160 acres in such a manner that no live stock was required on it, and who had for some years four cows, which he kept solely for profit by their milk and calves; and none of the milk being used for A.'s family,—Held, not a "cowkeeper" within the meaning of 5 & 6 Vict. c. 122. s. 10, 3

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